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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BELL.

M. Kallianikutti Amma on behalf of herself and all other creditors of P. K. Manavedan *alias* Anujan Raja Avl. .. *Petitioner** (*Plaintiff*)

v.

Puthiya Veettil Kunhilakshmi Amma and P. K. Thekkekettu Tavazhiyil Manavedan *alias* Anujan Raja Avl. .. *Respondents.* (*Defendants*).

Court-Fees Act (VII of 1870), Schedule II, Article 17 (i) and Article 17-A (Madras)—Suit by attaching decree-holder under Order 21, rule 63, Civil Procedure Code, to set aside order of executing Court allowing a claim under Order 21, rule 58, and for declaration that assignment in favour of claimant was void—Proper court-fee payable.

When property was attached in execution of a money decree, the wife of the judgment-debtor filed a petition under Order 21, rule 58, Civil Procedure Code, objecting on the ground that the said properties had been assigned to her by her husband and that she was in possession thereof. The Court upheld the claim and referred the decree-holder to a regular suit under Order 21, rule 63, Civil Procedure Code. The decree-holder filed a suit claiming that the order should be set aside in the interests of herself and the other creditors, and that an earlier mortgage and the deed of assignment in favour of the wife should be declared void against them. On a question as to the proper court-fee,

Held, that the appropriate Article was Article 17 (*i*) of the Court-Fees Act and not Article 17-A (Madras). Substantially it was not a suit for a declaration merely but for setting aside the order of the executing Court, the declaration asked for being merely a relief without which the setting aside of the order would be of little value to the plaintiff. The fact that to the claim to set aside such an order is added some other relief does not necessarily alter the substantial character of the suit.

Phul Kumari v. *Ghanshyam Misra*, (1907) 17 M.L.J. 618: L.R. 35 I.A. 22: I.L.R. 35 Cal. 202 (P.C.), referred to.

Arumugha v. *Venkatachala Pillai*, (1932) 64 M.L.J. 568: I.L.R. 56 Mad. 716, relied on.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order, dated 25th September, 1945, of the Court of the Subordinate Judge of Calicut in O.S. No. 25 of 1945.

P. Govinda Menon and *G. Gopinath* for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *C. K. Viswanatha Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The point is a short one and arises out of a question raised about the proper court-fee to be payable by the plaintiff who is the petitioner.

*C.R.P. No. 450 of 1946. 17th October, 1946.

The plaintiff obtained a decree against the second defendant for a considerable sum of money and in execution attempted to attach certain properties. The first defendant, the wife of the second defendant, filed a petition under Order 21, rule 58, Civil Procedure Code, objecting on the ground that the said properties had been assigned to her by her husband in 1939 and that she was in possession thereof. The Court by order dated 24th June, 1944, upheld her claim and referred the plaintiff-decree-holder to a regular suit under Order 21, rule 63.

The plaintiff duly filed the suit claiming that the order should be set aside in the interests both of the plaintiff and the other creditors. The final prayer was for setting aside the order and declaring that a mortgage dated 1933 and the deed of assignment dated 1939 are void as against the plaintiff and all other creditors of the second defendant. When the matter came before the Subordinate Judge in whose Court the suit had been filed he came to the conclusion, at whose instance is not apparent, that the suit was not merely a claim to have the order set aside but was in substance one for a declaration in favour of the plaintiff representing herself and all the other creditors. He therefore held that it came under Article 17-A of Schedule II of the Court-Fees Act and not under Article 17 (*i*) *simpliciter*. It is difficult to see how Article 17-A which is a Madras Amendment can apply at all. I am, however, satisfied on reading the plaint and having regard to the authorities which have been cited to me, that substantially this was not a suit for a declaration merely but for the setting aside of the order, the declaration asked for being merely a relief without which the setting aside of the order would be of little, if any, value to the plaintiff. The Privy Council in *Phul Kumari* v. *Ghanshyam Misra*[1] have made it clear that it is the substance of the matter which must be regarded. The fact that to the claim to set aside such an order is added some other relief does not necessarily affect the substantial character of the suit. In *Arumugha* v. *Venkatachala Pillai*[2], for example, the plaintiff prayed (1) to cancel an order, (2) to declare his title to a property, (3) to raise an attachment, and (4) for an injunction, nevertheless, Krishnan Pandalai, J., at page 717 says :

> "It will be observed that, although the plaintiff made four prayers, the substance of the whole matter was that his property had been illegally attached and he wanted that to be avoided; all else was mere words."

Now here the plaintiff had failed to attach by reason of an alleged bogus claim put forward by this woman. The plaintiff wants her attachment to become effective again and it cannot be held to be effective in any way if the bogus claim is still there in the background. It was necessary therefore for her to make clear what she was asking for by adding the subsidiary prayer for a declaration to the effect that the first defendant should not hereafter be able to re-assert her claim to this property in any execution proceedings.

I think this petition should be allowed and I hold that the appropriate Article is Article 17 (*i*) and that the fee paid by the plaintiff is correct. The additional fee will be returned. As I have said it is not clear at whose instance this court-fee point was taken, and so I do not in the circumstances make any order as to costs.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE KUPPUSWAMI AYYAR.

T. K. Verghese Vaidyar .. *Petitioner**

v.

Rex (Sub-Inspector of Police, Calicut) and another .. *Respondents.*

Criminal Procedure Code (V of 1898), section 54 (7)—Scope—Power to arrest without warrant—Condition necessary for exercise of—If person arrested should also be liable to be arrested without a warrant if offence had been committed in British India.

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1. (1907) 17 M.L.J. 618 : L.R. 35 I.A. 22: I.L.R. 35 Cal. 202 (P.C.).
2. (1932) 64 M.L.J. 568 : I.L.R. 56 Mad. 716.

*Crl.M.P. No. 1736 of 1946. 18th November, 1946.

Section 54 (7) of the Criminal Procedure Code authorises any police officer to arrest without a warrant any person (1) against whom credible information has been received that he has done an act outside British India, which, if done within British India would be an offence and (2) who, under any law relating to extradition, etc., is liable to be apprehended or detained in custody in British India. But there is nothing in section 54 of the Criminal Procedure Code which justifies a conclusion that the person arrested should be liable to be arrested without a warrant if the offence had been committed in British India.

Subodh Chandra Roy Chowdhry v. *Emperor*, (1924) I.L.R. 52 Cal. 319, dissented from.

In any event when the person arrested is charged under the Travancore Penal Code of offences corresponding to sections 148, 149, 324 and 436, read with section 109 of the Indian Penal Code, it being a cognizable case, the accused could have been arrested by the police without a warrant if such offence had been committed in British India. Such a person can therefore be arrested in British India without a warrant.

Petition under section 491 of the Code of Criminal Procedure, 1898, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order of the nature of *Habeas Corpus* directing the second respondent herein, the Superintendent, Sub-Jail, Calicut, to produce before the High Court of Judicature at Madras the petitioner herein now in the Sub-Jail at Calicut in the custody of the second respondent and set him at liberty.

A. Ramachandran for *Messrs. Row and Reddy* for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

The Order of the Court was made by

Horwill, J.—This is an application under section 491, Criminal Procedure Code, alleging that the petitioner was illegally and improperly detained by the Superintendent, Sub-Jail, Calicut and praying that this Court do issue an order for his release.

The petitioner was arrested without a warrant by the Sub-Inspector of Police of Calicut Town on information received from the Special Inspector of Police, Alleppey. The petitioner was produced before the Sub-Divisional Magistrate of Calicut, who remanded him to the Sub-Jail, Calicut.

It is argued that the procedure adopted by the police in the case was not warranted by law. Section 54 (7), Criminal Procedure Code, authorises any police officer to arrest without a warrant any person (1) against whom credible information has been received that he has done an Act outside British India, which, if done within British India would be an offence and (2) who, under any law relating to extradition, etc., is liable to be apprehended or detained in custody in British India. It is not denied that credible information that an offence was committed by the petitioner was received ; but it is argued that the petitioner is not under any law relating to extradition liable to be apprehended or detained in custody. We can find no authority for such a contention. Section 23 of the Extradition Act says :

". . . . . . . any person arrested without an order from a Magistrate and without a warrant in pursuance of the provisions of section 54, clause seventhly, may . . . . be detained in the same manner and subject to the same restrictions as a person arrested on a warrant issued by such Magistrate under section 10."

of that Act. The learned advocate relies on the dictum of Mukerjee, J., in *Subodh Chandra Roy Chowdhry* v. *Emperor*[1], in which the learned Judge read into the second part of section 54, clause seventhly, a proviso that the person should be liable to be arrested without a warrant if the offence had been committed in British India. With respect, we find nothing in section 54 or elsewhere which justifies that conclusion ; but we are not here dealing with a non-cognizable case. The petitioner has been charged under the Travancore Penal Code of offences corresponding to sections 148, 149, 324, 342 and 436, read with section 109 of the Indian Penal Code. If such offences had been committed in British India, there can be no doubt that the petitioner could have been arrested by the police without a warrant.

A great deal has been said about the procedure to be adopted in extradition proceedings ; but we are not here concerned with the extradition proceedings

1. (1924) I.L.R. 52 Cal. 319.

proper. We do not know whether they have yet been initiated or not. The Magistrate who committed the petitioner to the Sub-Jail has authority over him and can modify his orders if he subsequently finds that the petitioner ought not to be kept under further detention.

The petition is dismissed.

K.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Guntur Akkayya .. *Appellant**

v.

Pathuri Appayya .. *Respondent.*

Provincial Insolvency Act (V of 1920), section 78 (2)—Exclusion of time under, for suit or application for execution of decree by creditor—Limits—Annulment of adjudication and order under section 37 vesting the insolvent's estate in the Official Receiver for administration for the benefit of the creditors—Formal order closing proceedings passed nine years thereafter—Period between date of adjudication and the date of the closing of the proceedings, if can be excluded—Limitation Act (IX of 1908), section 15—Applicability.

After the passing of a decree on 25th February, 1933, for a particular amount and costs, the judgment-debtor was by an order of adjudication passed on 4th July, 1933 adjudged insolvent. As the insolvent failed to apply for his discharge within the time allowed, on a creditor's application the Court, on 21st November, 1934, annulled the order of adjudication and under section 37 of the Provincial Insolvency Act passed an order vesting the insolvent's property in the Official Receiver for administration for the benefit of the creditors. The decree-holder tendered proof of his debt on 12th April, 1935, which was accepted by the Official Receiver. The Official Receiver realised some of the assets of the insolvent and on 10th May, 1940, paid to the creditors a dividend. On 12th February, 1943, the Subordinate Judge passed an order closing the proceedings. The Official Receiver, however, still had in his possession some amount belonging to the insolvent and on 9th December, 1943, the decree-holder applied for execution of his decree by the attachment of this amount. On an objection that the decree was barred by limitation, the decree-holder contended that he was entitled to exclude the entire period between the date of the order of adjudication and the final order closing the proceedings.

Held, that the order of the 21st November, 1934, was an order annulling the adjudication under the Act and as it was the date of that order which was material, the application for execution was hopelessly time-barred. The fact that an order had been passed under section 37 of the Act vesting the insolvent's property in the Official Receiver had no bearing on the point. It could not preclude the decree-holder from applying for execution and even assuming that he would require the leave of the Insolvency Court to proceed against the assets in the hands of the Official Receiver, that would not affect the position. Nor could section 15 of the Limitation Act help the decree-holder inasmuch as there was no specific stay of the execution of the decree.

Ramaswami Pillai v. *Govindaswamy Naicker*, (1918) 36 M.L.J. 104 : I.L.R. 42 Mad. 319 and *Chidambaram* v. *Meyappa*, (1943) 2 M.L.J. 510 : I.L.R. 1944 Mad. 410, referred to.

Appeal under clause 15 of the Letters Patent against the judgment and order of Happel, J., dated 14th February, 1946, in A.A.A.O. No. 109 of 1945, High Court, preferred against the order of the Court of the Subordinate Judge, Guntur, dated 28th November, 1944 in A.S. No. 177 of 1944 (E.P. No. 889 of 1943 in O.S. No. 486 of 1932, District Munsiff Court, Guntur).

K. Kotayya for Appellant.

K. Umamaheswaram for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal from a judgment of Happell, J., under clause 15 of the Letters Patent. The question involved is one of construction of section 78 (2) of the Provincial Insolvency Act, 1920.

On the 25th February, 1933, the appellant obtained a decree against the respondent for the payment of Rs. 1,148-6-8 and costs. During the pendency of the suit the respondent applied to the Court of the Subordinate Judge of Bapatla for his adjudication in insolvency and on the 4th July, 1933, an order of adjudication

* L.P.A. No. 70 of 1946. 7th November, 1946.

was passed. The respondent was given one year in which to apply for his discharge. He did not make the application and on the 11th November, 1934, a creditor applied for the annulment of the order of adjudication under section 43 of the Act. On the 21st November, 1934, the Court annulled the order of adjudication and under section 37 passed an order vesting the insolvent's property in the Official Receiver for administration for the benefit of the creditors. On the 12th April, 1935, the appellant tendered proof of his debt which the Official Receiver accepted. In the year 1939, the amount was, however, scaled down to Rs. 663-3-8 under the provisions of the Madras Agriculturists' Relief Act.

The Official Receiver realised some of the insolvent's assets and on the 10th May, 1940, he paid to the creditors a dividend. The appellant's share was Rs. 123-8-0. On the 19th January, 1943, the Official Receiver wrote to the creditors saying that no saleable property was left and on the 12th February, 1943, the Subordinate Judge passed an order closing the proceedings. It transpired, however, that the Official Receiver still had in his possession Rs. 771 belonging to the insolvent and on the 9th December, 1943, the appellant applied for the execution of his decree by the attachment of this sum. The respondent opposed the application on the ground that the appellant's decree was barred by the law of limitation. The District Munsiff of Guntur and the Subordinate Judge of Guntur on appeal found for the appellant, but on appeal by the respondent to this Court, Happell, J., held that the application for execution was out of time. The plaintiff has appealed from this decision.

Section 78 (2) of the Provincial Insolvency Act reads as follows :

"Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-section (2) of section 28) which might have been brought or made out for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded:

Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act."

Happell, J., held that the order of annulment referred to in the section meant any order annulling the order of adjudication and the fact that an order had been passed under section 37 vesting the insolvent's assets in the Official Receiver had no bearing. The argument advanced on behalf of the decree-holder was that there was no effective annulment until the insolvency proceedings were formally closed on the 12th February, 1943; but the learned Judge refused to accept this contention. He considered that the "order of annulment" had a definite meaning attributed to it by the provisions of the Act and that the meaning could not be enlarged when construing section 78 (2).

We are in full agreement with the opinion expressed in the judgment under appeal. Sub-section (2) of section 78 starts with the words "where an order of adjudication has been annulled under this Act". The order of the 21st November, 1934, was an order annulling the adjudication under the Act and it is the date of that order which is material. The appellant could have kept his decree alive by applying periodically for the execution of his decree. The fact that the available assets of the insolvent had been vested in the Official Receiver for administration purposes could not preclude the plaintiff from applying for execution. Without deciding the point, we will assume that he would require the leave of the Insolvency Court if he wished to proceed against any of the assets held by the Official Receiver, but this would not affect the position.

In *Ramaswami Pillai* v. *Govindasami Naicker*[1], a Bench of this Court held that in computing the period of limitation for suits instituted against a person who had been adjudicated an insolvent but whose insolvency was annulled, section 15 of the Limitation Act did not permit the deduction of time during which the order was in force as under section 16, clause 2 of the Provincial Insolvency Act, 1907

1. (1918) 36 M.L.J. 104 : I.L.R. 42 Mad. 319.

(which corresponds to section 28 (2) of the present Act), an order of adjudication did not effect an absolute stay of suits against the insolvent but only made it necessary that leave to sue should be obtained from Court before institution. In *Chidambaram* v. *Meyyappa*[1], the present Bench held that the order of injunction contemplated by section 15 of the Limitation Act is an injunction or order which specifically stays execution of the decree and a preliminary decree in an administration suit could not be regarded as amounting to an injunction or order within the meaning of that section. Therefore, section 15 of the Limitation Act cannot help the appellant. As the adjudication was annulled in 1934 the application for execution is hopelessly time-barred.

The appeal is dismissed with costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR SIDNEY WADSWORTH, *Officiating Chief Justice* AND MR. JUSTICE GOVINDARAJACHARI.

Ponnia Pillai and others .. *Appellants**

v.

Pannai minor Sivanupandia Thevar through his brother and guardian R. K. Viswanatha Thevar .. *Respondent.*

Suit on the basis of tenancy—Right to relief on the basis of decision as to title—Lands forming part of a large number registered as gramanatham poromboke—*Proof of title in respect of—Right to claim value of improvements*

Where in suits filed on the basis of an averment of tenancy, the defendants themselves put into issue the title of the plaintiff and set up adverse possession and the main issue in each of such suits raises the question whether the plaintiff or the defendant had title to the lands in dispute and evidence is taken fully on the question of title, notwithstanding the failure to establish in every case the plaintiff's right to recover the property on the footing of the tenancy alleged, there is no reason why, if his title is established, a decree based on such title could not be given against the defendants. It might, no doubt, be undesirable to give a decree in such circumstances merely on a finding that the plaintiff was entitled to the property in cases where it was necessary for the plaintiff to establish possession within 12 years of a suit in order to get a decree on his title. But that difficulty would not arise in a case where the plaintiff claims the property as reversioner on the death of a limited owner and is still a minor and there can therefore be no question of his suit being barred provided his title is established.

Though the lands in question are plots situated within a large number which is registered in the revenue records as *gramanatham porombokes,* where not only have the plaintiff's predecessors been dealing with them for a long period of years by means of registered leases and otherwise, but the village officers have given evidence that the lands are occupied *gramanatham* and do not form part of the land which is at the disposal of the Government, it is impossible for the defendants in possession to contend that the plaintiff's title is bad because of any title inhering in the Government.

Where there is nothing in such suits in the nature of a perpetual lease or an absolute title which could provide a foundation for a claim under section 51 of the Transfer of Property Act, the defendants can have no claim to compensation for improvements.

Where the decision in such suits is based not on the proof a subsisting tenancy but on the proof of a subsisting title, the question of a right to claim either the value of the superstructure or the materials thereof does not really arise.

Appeals under clause 15 of the Letters Patent against the judgments and decrees of Shahabuddin, J., dated 31st October, 1945 and passed in S.A. Nos. 1004, etc., of 1943 respectively preferred to the High Court against the decrees of the Court of the Subordinate Judge of Tinnevelly in A.S. Nos. 114, etc., of 1942 respectively preferred against the decrees of the Court of the District Munsiff of Ambasamudram in O.S. No. 179, etc., of 1940.

K. Subba Rao for Appellants.

K. V. Ramachandra Aiyar for Respondent.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—These Letters Patent Appeals arise out of a decision of Shahabuddin, J., in a batch of second appeals concerning a number of plots

1. (1943) 2 M.L.J. 510 : I.L.R. 1944 Mad. 410.

*L.P.A. Nos. 28 to 40 of 1946. 30th October, 1946.

situated in a large block of village site claimed to be the property of the minor plaintiff. The appellants are the defendants. One Sivanupandia Thevar, who died in 1897 was the owner of an estate known as "the Pannai estate" which is alleged to comprise amongst other things the western portion of S. No. 340, which is part of the village site or *gramanatham*. He left three daughters, Muthammal, who died in 1924, Ponnammal who seems to have died before 1909 and Madipillai Ammal who died in 1928. Ponnammal had a daughter who also died long ago leaving a son Murugiah Thevar. In 1927, there was a partition of the estate between Madipillai Ammal, Sangathal, the daughter of the deceased Muthammal, and Murugiah, the grandson of the deceased Ponnammal. By the partition arrangement the property with which we are now concerned was handed over to Murugiah Thevar. A curious factor in this case is that it was the practice of the ladies who enjoyed this estate to give it on lease to a lessee called the *kattukuthagaidar* who will be referred to hereafter as the intermediate lessee. He paid a lump sum rent both for the privilege of cultivating the cultivable lands and also for the privilege of collecting the rents from the various house sites comprised in the village site number. But the occupants of these house sites were given leases in the name of one or more of the actual proprietors so that they were not sub-lessees of the intermediate lessee who collected the rents. After this partition arrangement had been made, the surviving daughter of Sivanupandia Thevar, Madipillai Ammal adopted her daughter's son, the plaintiff, who was then a young child and after making this adoption she died sometime in 1928.

The legal position at the time of her death was that the property with which we are now concerned was held by Murugiah under a partition arrangement which was good so long as Madipillai Ammal was alive but would not bind the plaintiff as the reversioner of the estate of his adopted mother's father. It was however sometime before the plaintiff's protectors realised the necessity for taking action. Eventually the District Court appointed a guardian for the minor plaintiff and in 1932 a suit was filed against Murugiah and Sangathal, the daughter of the eldest sister Muthammal, claiming recovery of the estate. In this suit, the tenants of the house sites were not impleaded as parties, but the intermediate lessee was. The suit was decreed in 1935.

The facts vary slightly with reference to each of the properties covered by these various suits; but we do not think it necessary to set forth those details which have been fully stated in the judgment of the first appellate Court. It is sufficient to say that in all the appeals there was some sort of a document of lease from an estate; but in two of the cases these leases were unregistered and in two other cases the leases were actually given in the time of Murugiah after the death of the plaintiff's adopted mother. But it would appear that all the properties with which we are concerned were originally held by somebody or other (not always a relative of the defendant concerned) under a tenancy created by the proprietor of the Pannai estate at some time before the trouble arose. Most of the registered leases expired long ago. It also seems to be established that Murugiah was in actual possession of the landlord's interest with reference to all these plots since the partition in 1927 even after the death of Madipillai Ammal in 1928, and that the intermediate lessee went on collecting the rents without recognising the plaintiff as the real owner of the estate. The rents seem to have been paid in nearly every case up to 1932, when the litigation started. There is no positive evidence that the intermediate lessee was recognising Murugiah as his lessor, but the fact that when a fresh lease was executed by the intermediate lessee after the death of Madipillai Ammal, he executed it in favour of Murugiah, leads to the natural inference that he was recognising Murugiah as his landlord. The probability therefore seems to be that such rents as were paid after 1928 by the various tenants to the intermediate lessor were paid to him as the agent of Murugiah.

The suits in which the plaintiff claims to recover possession from all those various defendants were undoubtedly filed on the footing that the defendants held

the properties as tenants holding over on the termination of leases granted by the estate of which the plaintiff was the proprietor. It is in fact difficult to establish this case, though it was found to have been established so far as most of the lands are concerned by the trial Court and the first appellate Court. If in fact Murugiah was denying the plaintiff's title and the defendants were after 1928 holding under Murugiah by paying rent to him through his agent and if from 1932 onwards they were paying rent to nobody at all, there is an obvious difficulty in holding that the defendants were tenants holding over on the termination of oral leases from the plaintiff or his predecessor. It is not as if the plaintiff is claiming as the successor of Murugiah. His claim is based on the assertion that Murugiah was after the death of the limited owner a trespasser; and though no doubt by the success of the suit against Murugiah, the plaintiff would become entitled to evict any persons whom Murugiah had let into possession that would not be on the footing that he was their landlord but on the footing that their landlord was a person who had no title. We are therefore not convinced of the soundness of the view that all the leases, oral or otherwise, given by Murugiah must on or after the date of the plaintiff's decree be deemed to be leases given by the plaintiff.

It has been contended that if there was no tenancy relationship between the plaintiff and the various defendants, the plaintiff's suits based as they were on an assertion of tenancy should have been dismissed. In fact, however, the defendants themselves put into issue the title of the plaintiff and claimed that they themselves were not the tenants of any body, but had themselves acquired title by adverse possession and in each of the suits, the first issue was

"Whether the plaintiff is the owner of the plaint third schedule property as alleged by him or does it belong to the defendant as contended by him?"

Mr. Subba Rao for the appellants has relied on the decision in *Balasidhantam* v. *Perumal Chetti*[1] as authority for the view that when a suit was based on tenancy the Court cannot go into the defence based on denial of the plaintiff's title and give an adjudication thereon except for the purpose of deciding the question of tenancy. This argument is, however, based on an incorrect headnote to the report; for what the learned Judges really held was that the Court need not go into the question of title. The decision in *Gobindakumar Sur* v. *Mohinimohan Sen*[2], which follows *Balasidhantam* v. *Perumal Chetti*[1] seems also to proceed on the basis of the headnote and not on the basis of the actual decision. It was held by a Full Bench of the Allahabad High Court in *Balamukund* v. *Dalu*[3], in a suit filed on the basis of an averment of tenancy which was not properly proved, that even though no issue was framed regarding title but the defendant had denied the plaintiff's title and had set up adverse possession and evidence was taken fully on both sides on the question of title, a decree based on the plaintiff's title could be given against the defendants. The plaintiff is in a stronger position here, for undoubtedly the main issue in each of these suits raises the question whether the plaintiff or the defendant had title to the lands in dispute. It might, no doubt, be undesirable to give a decree in such circumstances merely on a finding that the plaintiff was entitled to the property in cases where it was necessary for the plaintiff to establish possession within 12 years of a suit in order to get a decree on his title. But that difficulty does not arise here, for the plaintiff is claiming the property as the reversioner on the death of the limited owner in 1928 and he is still a minor. There can be no question therefore of his suit being barred provided that his title is established. We are therefore of opinion that notwithstanding the difficulty of establishing in every case the plaintiff's right to recover the property on the footing of the tenancy alleged, if his title is established, there is no reason why he should not get a decree on the finding of the first issue in each suit.

It has, however, been contended that the plaintiff's title was not established and that the finding of the Courts below upholding his title was wrong. The

1. (1914) 27 M.L.J. 475.
2. (1929) I.L.R. 57 Cal. 349.
3. (1903) I.L.R. 25 All. 498.

argument is that all these lands were plots situated within a large number which is registered in the revenue records as *gramanatham poromboke* and it is contended on the authority of the decision in *Jayarama Naidu* v. *Secretary of State for India*[1], that when there is a question of title to land registered as *gramanatham poromboke*, mere proof of occupation for a period of years less than 60 years would not be sufficient and it is necessary to establish either a grant from Government or occupation for a sufficient period to establish a prescriptive right against the Government. We are not in the present case concerned with a dispute between a private claimant to a village site on the one hand and the Government on the other, as in the decision just quoted. All the defendants have been paying rent at one time or another to a person purporting to be the agent of one or other member of the family claiming as the successor of Sivanupandia Thevar to whom the plaintiff is the reversioner. The defendants, however, have not paid rent to the plaintiff or acknowledged his title and if they can show that the plaintiff has not established his title and that the real owner is the Government the suits must fail. It seems to us that the plaintiff's title to the property has been sufficiently established. Not only have the plaintiff's predecessors been dealing with these lands for a long period of years by means of registered leases and otherwise, but both the village officers have given evidence that the lands in question are occupied *gramanatham* and do not form part of the land which is at the disposal of the Government. It is also established that when certain of the defendants applied to the Tahsildar for a grant of the lands in their occupation, the Tashildar refused to make the grant on the ground that the sites which they claim were already private property. On these materials it is impossible to contend that the plaintiff's claim to title is bad because of any title inhering in the Government whose officers support the title of the plaintiff.

We do not think it necessary to dwell at length on the argument that when the only document of lease is an unregistered document which cannot be effective to create a tenancy the inference from the payment of rent should not be that the occupant is a tenant but that he is a mere licensee. The argument is based on a decision of single Judge of the Allahabad High Court in *Anand Sarup* v. *Taiyab Hasan*[2]. It seems to run contrary to the reasoning of the Bench decision of this Court in *Manickam Pillai* v. *Ratnasami Nadar*[3]. Moreover in the view that we take that the plaintiff is entitled to succeed on his title, the question really becomes immaterial.

The appellants have contended that if they are to be evicted, they are entitled to the value of the improvements which they have made to the property. It has been argued that the decision of Ramesam and Jackson, JJ., in *Subbarao* v. *Veeranjaneyaswami*[4], has extended the principle of section 51 of the Transfer of Property Act to permanent leases and if it is sufficient in order to establish a claim under this section for the transferee to show that he is a lessee who did not expect to be evicted, then all these defendants would be entitled to recover the value of the houses which they have built. In *Shunmugha Desikar* v. *Ananthakrishnaswami Naidu*[5], one of us had occasion to consider the decision in *Subbarao*, v. *Veeranjaneyaswami*[4], the authorities upon which it is based and certain other Bench decisions of this Court which seem to sound in a different direction. We do not think it necessary for the purposes of the present case to go into the question whether the decision in *Subbarao* v. *Veeranjaneyaswami*[4], has not extended section 51 of the Transfer of Property Act, rather further than is justified by the words of the section. It is sufficient for the purposes of the present case to say that in none of these suits is there anything in the nature of a perpetual lease or an absolute title which would provide a foundation for a claim under section 51 nor are there any facts upon which any equitable estoppel could be put. The appellants have, therefore, no claim to compensation for improvements.

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1. 1929 M.W.N. 143.
2. A.I.R. 1943 All. 279.
3. (1917) 33 M.L.J. 684.
4. A.I.R. 1930 Mad. 298.
5. 1938 M.W.N. 1236.

Lastly the appellants have put forward a contention which has not been raised in the pleadings and does not appear to have been argued in the trial Court or in the lower appellate Court, though we are told that it was mentioned before Shahabuddin, J. That contention is based on the words of the various rental agreements. In Ex. P-41, one of these agreements the relevant words are :

"If after the expiry of the above stipulated period it is necessary that you should have the site, I shall remove my superstructure or I shall receive the value thereof and leave the site."

Similar words are found in Ex. P-28 where the words have been translated :

"I shall deliver the above site either by removing the superstructure herein or by receiving its value."

The contention is that these and similar words in other agreements give the option to the tenant to claim either the value of the superstructure or the materials thereof and that the lessor is obliged to pay the value if the tenant wants it. It seems to us that the clause on which reliance is placed is at the best ambiguous. There are no words which definitely place an obligation upon the lessor to pay at the option of the tenant. Moreover, the enforcement of this option, if it exists, depends on the subsistence of the tenancy and the appellants have been strenuously urging with a certain amount of success that there was no tenancy on the strength of which they could be evicted. Seeing that our decision is based not on the proof of a subsisting tenancy but on the proof of a subsisting title, the question does not really arise.

In the result, we dismiss the appeals with costs—advocates' fee Rs. 20 in each case.

V.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR SIDNEY WADSWORTH, *Officiating Chief Justice*, AND MR. JUSTICE GOVINDARAJACHARI.

Muttalooru Bojjanna .. *Appellant**

v.

Boya Kristappa .. *Respondent.*

Civil Procedure Code (V of 1908), section 151 and order 21, rule 90—Inherent power of Court to cancel a sale in execution after confirmation on the ground of the fraud of the decree-holder—No application under Order 21 rule 90 filed in time—Time for deposit of sale amount—No inherent power in the Court to extend—New plea under section 18, Limitation Act—Not raised and necessary facts not pleaded in execution application—If can be raised in Letters Patent appeal.

As regards the inherent powers of Court, the general rule is that the Court should not presume the existence of an inherent power to do that for which a statutory provision has been made and outside the limited discretion conferred by the Limitation Act, in certain cases, a Court has no general discretion to relieve a suitor from the operation of the provisions of the Limitation Act.

A Court has not the power under section 151 of the Civil Procedure Code, to cancel a sale in execution after it has been confirmed on the ground of a fraud on the Court in the matter of the valuation of the property sold, which fraud had not been the subject of an application under Order 21, rule 90 of the Civil Procedure Code, preferred within the time allowed. The Code having a given a specific remedy, the Court cannot be presumed to have an inherent power overlapping or running parallel to the procedure laid down in the Code.

Similarly in the matter of depositing the sale amount in Court, the code clearly provides a definite period of limitation for such payments and there cannot be an inherent power in the Court to extend that period beyond the limits prescribed by the Code.

Raghavachariar v. *Muruga Mudaliar*, (1923) 44 M.L.J. 680 : I.L.R. 46 Mad. 583 explained and doubted.

There is no reason why the principle of Order 7, rule 6 of the Civil Procedure Code, should not be applied to an application to set aside a sale in execution and it would be improper to treat an apparently time-barred application as being within time by calling in aid section 18 of the Limitation Act when the pleading does not show how the exemption under the section is available to the petitioner and particularly when the plea is raised for the first time in Letters Patent Appeal.

Appeal under clause 15 of the Letters Patent against the judgment and order of Koman, J., dated 22nd January, 1946 and passed in A.A.A.O. No. 43 of 1945 preferred to the High Court against the order of the District Court, Bellary, dated

*L.P.A. No. 27 of 1946. 1st November, 1946.

14th August, 1944 and made in A.S. No. 153 of 1943 preferred against the order dated 9th October, 1943 in E.A. No. 552 of 1943 in E.P. No. 992 of 1942 in O. S. No. 94 of 1940 on the file of the District Munsiff Court, Bellary.

K. Subba Rao and *C. Kondiah* for Appellant.

P. Chandra Reddi for Respondent.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—This is an appeal against the decision of Koman, J., and it raises the question of the extent of the inherent powers of the Court in dealing with a sale in execution of a mortgage decree. The appellant obtained a decree on a mortgage of 1929. The final decree was passed on 10th February, 1942. The part of the hypotheca with which we are now concerned was put up for sale on 2nd April, 1943, but there were no bidders and the sale was adjourned to the 19th April, 1943, when four items were sold, including items 6 and 9 with which we are now concerned. Both of these items were purchased by the decree-holder at a price slightly in excess of the upset price. Item No. 6 which is S. No. 440-B is of an extent of 103 acres 9 cents of dry land which the decree-holder valued at Rs. 200. The upset price fixed by the Court was Rs. 400 and the successful bid was Rs. 405. Item No. 9 is of an extent of 19·93 acres which was valued by the decree-holder at Rs. 50, the upset price was Rs. 100 and the successful bid Rs. 102. The Court closed shortly after this sale and re-opened on the 7th June. On the 10th June, the sale of these two items 6 and 9 was confirmed and part satisfaction was recorded. On the afternoon of the day on which the sale was confirmed, the judgment debtor appeared in Court with the amount of the decree to get the sale set aside. But it was too late to make the deposit.

On the 30th June, 1943, that is to say more than two months after the sale and twenty days after the confirmation of the sale, the judgement-debtor filed the petition out of which these proceedings arise. The petition purports to be under sections 47 and 151 and Order VII, rule 1 of the Code of Civil Procedure. It scrupulously avoids any reference to the provisions of Order 21, rule 90 of the Code. It starts by reciting the bare facts, stating that the sale is a nullity having been effected by playing fraud on the Court as well as on the petitioner. Then it proceeds to set forth the particulars of the fraud. Firstly it is alleged that after the first abortive sale, the petitioner tendered to the decree-holder the amount of the decree; there was a Panchayat on or about the 10th April, 1943 in which it was settled that the decree-holder should get correct particulars of the amount due from his vakil, get the sale adjourned to some other date after the holidays and take the amount in full satisfaction of the decree. It is alleged that when the properties came up for sale on 19th April, the decree-holder clandestinely and in defiance of the agreement, got the properties knocked down to himself for absurdly low prices, keeping back the facts from the knowledge of the debtor and his friends. Next it is asserted that the petitioner came to know of the fraud practised by the decree-holder "during the holidays" on enquiry from his vakil who wrote to him that he should come to Court with money on the 10th of June. Then it is alleged that the petitioner charged the decree-holder with fraud and the latter said that he would get matters rectified immediately after the reopening of the Court and that he failed to do so. Then the petitioner came to Court on 10th June, to deposit the money by way of abundant caution and to his surprise found that the sale had been already confirmed. On account of the fraud practised by the decree-holder, the petitioner was kept back from coming to the Court and the other bidders in the village also were kept back from attending the Court on the day of sale. It was also contended with reference to item 6 that the petitioner has no saleable interest in the land which contains a temple utilised by the public to whom free access is given. The profits of the land have been endowed for the maintenance and upkeep of the temple. The decree-holder is charged with having suppressed the fact that there is a temple which makes the land public property and as such inalienable. As to item 6 it is also said that it is worth Rs. 6,000, that the bid of Rs. 405 is grossly inadequate,

the decree-holder has gained an unconscionable advantage and the sale is therefore a nullity.

It is to be noticed that the whole application is based on the alleged fraud in the matter of the Panchayat agreement for the liquidation of the decree and the postponement of the sale while inquiry was being made. The trial Court did not believe that story; but the learned District Munsiff came to the conclusion that the major item, item 6 had been undervalued by the decree-holder by the omission of all reference to the temple constructed in the land the value of which is admittedly at least Rs. 700. No attention seems to have been given to the fact that if the temple was as alleged public property dedicated to a God it would not be the property of the judgment debtor, and could not pass to the purchaser at the Court auction. However, the learned District Munsiff after pointing out that a petition to set aside the sale having regard to Order 21, rule 90, of the Code would become barred on 7th June, 1943, that as it was a mortgage decree, the decree amount should have been paid on 10th June, 1943 before the sale was confirmed and that the judgment-debtor arrived at the Court on the afternoon of the day of the confirmation of the sale apparently owing to the bus arriving late, remarks that it is not unusual in such circumstances that the Court should set right the matters excusing the delay. The learned District Munsiff concludes that on account of the unfortunate delay in the arrival of the bus on the 10th June, and also on account of the fact that the decree-holder deliberately misled the Court in valuing the property, this is a fit case in which the Court should exercise its inherent power under section 151 of the Code of Civil Procedure; and for the ends of justice and to prevent abuse of the process of Court it is essential that the sale should be set aside. The whole sale was therefore set aside.

This order was confirmed by the learned District Judge who does not go into the question of the truth of the alleged Panchayat, but bases his conclusion solely on the fact that there was a fraud on the Court by the suppression of any reference to the building on item 6. The learned District Judge says,

> "I am definitely of the opinion that even after a Court has confirmed sale order if a judgment-debtor in a mortgage suit appears that same day a little late and offers to deposit the whole amount, it is open to a Court to cancel its order of confirmation and allow this to be one under Order 34, rule 5 of the Civil Procedure Code in special circumstances such as this,"

and quoting *Raghavachariar* v. *Murugesa Mudali*[1], the learned Judge comes to the conclusion that the District Munsiff had inherent powers to cancel the sale. This decision has been confirmed by Koman, J., in second appeal.

No case has been quoted before us in which it has been specifically held that after a sale in execution has been confirmed, the Court can, by the exercise of its inherent powers, cancel that sale on the ground that there has been a fraud on the Court by the suppression of relevant matters in the sale proclamation. The general rule undoubtedly is that the Court should not presume the existence of an inherent power to do that for which a statutory provision has been made and it is quite clear that outside the limited discretion conferred by the Limitation Act in certain cases, a Court has no general discretion to relieve a suitor from the operation of the provisions of the Limitation Act, vide *Maqbul Ahmad* v. *Pratap Narain Singh*[2]. In the present case, the petitioner came to Court alleging that the sale was a nullity because of the fraudulent conduct of the decree-holder in getting the sale knocked down in his favour notwithstanding an agreement that he would get the sale adjourned. That allegation was not proved to the satisfaction of the trial Judge. No doubt the petition does also contain an allegation that the sale has been for much less than the real value of the property and it contains a reference to the existence of the temple on the land. But the temple is referred to only for the purpose of showing that the petitioner has not got a saleable interest therein and that the public have certain rights which prevent the land from being sold. There

1. (1923) 44 M.L.J. 680: I.L.R. 46 Mad. 583.
2. (1935) 68 M.L.J. 665: 62 I.A. 80: 57 All. 242 (P.C.).

is no suggestion that the saleable value of the land as the land of the petitioner was enhanced by the existence of this temple.

If there was a fraud in publishing the sale or in the conduct of the sale, an application under Order 21, rule 90 of the Code is the proper remedy for a person whose interests are affected by the sale. For that remedy a period of limitation has been prescribed and no doubt the person affected could get the benefit of section 18 of the Limitation Act if he alleged and proved that he was prevented from getting knowledge of the sale by the fraud of the opposite party. The point to note is that if we assume the fraud which the petitioner does not allege in his petition but which the Court has inferred out of the facts appearing in the evidence, it is a fraud in the preparation of the proclamation of sale. The decree-holder is found to have suppressed the fact which has resulted in the settlement of wrong terms for the sale. It is admitted that the judgment-debtor was aware of the original sale. He had notice of the proclamation and did not object to its terms. Assuming that there was a fraud on the Court for which the decree-holder was responsible, that was a matter which would have given the petitioner a ground for an application under Order 21, rule 90 of the Civil Procedure Code, to set aside the sale. *Prima facie*, therefore, it is not a ground with reference to which the Court should presume the existence of any inherent power to remedy the wrong done. The Code having given a specific remedy, the Court cannot be presumed to have an inherent power overlapping or running parallel to the procedure laid down in the Code.

Similarly with reference to what seems to be the alternative ground for the exercise of the inherent powers, *viz*., the hardship resulting from the lateness of the arrival of the judgment debtor to deposit the sale amount, the Code provides that in the case of a mortgage decree, the sale may be set aside by a deposit of all the amounts due from the judgment-debtor at any time before the confirmation of the sale. If the judgment debtor takes the risk of deferring his deposit until the very day of the confirmation of the sale and then arrives too late owing to some accident, it is no doubt unfortunate, but he has only himself to blame for taking the risk of waiting to the last possible day. At any rate the Code clearly provides a definite period of limitation for such payments and it seems to us that there cannot be an inherent power in the Court to extend that period beyond the limits prescribed by the Code.

The respondent in the argument before us has relied chiefly on the decision in *Raghavachariar* v. *Murugesa Mudali*[1], in which it was held by Schwabe, C.J., and Wallace, J., that a Court has an inherent power to refuse to confirm a sale held in Court auction if it is satisfied that it has been misled by the decree-holder either by actual misstatements to the Court or non-disclosure to the Court of relevant facts unknown to the Court and which there was a duty to bring before the Court. In the judgment of Wallace, J., the learned Judge remarks that order 21, rule 92 of the Code of Civil Procedure is no bar to the Court interfering to cancel the sale in such circumstances. It is contended that by inference from this decision if the Court has an inherent power to disobey the mandatory provisions of Order 21, rule 92 and refuse to confirm the sale it must also have the inherent power, on proof of a fraud on the Court, to cancel a sale which has already been held and confirmed. There are no doubt observations in the judgments in this case which would seem to go some way towards supporting the respondent's argument, and it is possible that at some future time the correctness of these observations will have to be considered. We are however, concerned now with the actual decision. The observation of Wallace, J., with reference to Order 21, rule 92 may well have been influenced by the fact that in the case before that Bench there was an application under Order, 21, rule 90 of the Code which was actually before the learned trial Judge at the time when he purported to invoke his inherent powers to refuse

1. (1923) 44 M.L.J. 680 : I.L.R. 46 Mad. 583.

to confirm the sale. What seems to have happened was that the application to set aside the sale was based on untenable grounds and the trial Court called in aid its inherent powers to give effect to a ground for setting aside the sale which might have been but was not taken in the actual application. It was therefore a case to which Order 21, rule 92 did not in terms apply. Moreover although the learned Judges observed that the Courts have inherent powers to refuse to confirm a sale when it is established that there has been a fraud on the Court, they were in fact dealing with a case in which an application under Order 21, rule 90 of the Code was pending and the same result could have been achieved by allowing the applicant to amend his application and allege the fraud which the Court found to have been committed. We do not therefore think that the rather wide observations in this judgment are sufficient authority for holding that the Court has a discretion to disregard the mandatory provisions of order 21, rule 92 in a case where there has been no application under rules 89, 90 or 91 of Order 21, of the Code or where such an application has been made and dismissed. Nor do we think this decision is authority for the further proposition that when a sale has been held and confirmed without objection, the Court can utilise its inherent powers to give effect to any objection based on fraud which should have been put forward by an application under Order 21, rule 90 of the Code, when no application has been preferred within the time allowed. We are therefore of opinion that the trial Court had not the power under section 151 of the Code of Civil Procedure to cancel this sale on the ground of fraud in the valuation of the land, which fraud had not been the subject of an application under Order 21, rule 90, of the Code filed within time.

We are however asked to treat this application as an application which is within time, having been filed within 30 days of the date on which the petitioner had knowledge of the sale, he having been kept from prior knowledge of the sale by the fraud of the decree holder, and we are asked to hold that the sale is liable to be set aside in such circumstances either because of suppression of facts affecting the value, a matter falling under Order 21, rule 90 of the Code, or because owing to the fraud of the decree-holder in the circumstances of the alleged Panchayat (on which the District Judge has given no finding) the petitioner was prevented from averting the sale by paying the decree amount. This contention involves the admission of a plea under section 18 of the Limitation Act which is not put forward in the petition and has not apparently been suggested at any of the three previous hearings of the case. Nor are there the facts pleaded in the petition on which a plea under section 18 of the Limitation Act could be founded. The only relevant plea is that the petitioner came to know of the fraud practised by the respondent "during the holidays on enquiry from his vakil." Since the Court re-opened on the 7th of June and the petition was actually filed on the 30th of June, it is obvious that the averment that the petitioner only came to know the facts during the holidays would not be sufficient averment if he sought to save limitation for his petition by pleading section 18 of the Limitation Act. We see no reason why the principle of Order 7, rule 6 of the Code of Civil Procedure should not be applied to an application to set aside a sale in execution and it seems to be improper to treat an apparently time-barred application as being within time by calling in aid section 18 of the Limitation Act when the pleading does not show how the exemption under the section is available to the petitioner and particularly when the plea is raised for the first time in Letters Patent Appeal. Moreover, the plea rests in substance on allegations of fact which have been discredited by the trial Court though the learned District Judge has not given any finding upon them.

In the result, therefore, we allow the appeal with costs throughout and restore the order confirming the sale of items 6 and 9.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR AND MR. JUSTICE SHAHABUDDIN.

Kollipara Nagendram .. *Appellant**

v.

Chundru Appayya and others .. *Respondents.*

Court Fees Act (VII of 1870) Sections 7 (v) and 12 (ii)— Suit for partition — Assignment of rights of plaintiff after suit to stranger—Addition of such stranger as plaintiff—Original plaintiff subsequently transposing himself as defendant—Continuation of suit by transferee as plaintiff—Nature of suit thereafter—Court fee payable—Procedure—Power of appellate court to set right mistake in procedure.

The mere fact that during the pendency of a suit for partition by a coparcener the plaintiff transfers his rights to a stranger who is then added as additional plaintiff would not entail additional court-fee on the ground that the alienee was not a person in joint possession of the suit properties along with the defendants. But when the original plaintiff decides not to prosecute the suit as originally laid by him and finally allows himself to be transposed as a defendant, the nature of the suit becomes altered in a material degree. It ceases to be a suit for partition by one coparcener against the other coparceners. It becomes a suit by a person claiming to be an alienee from a coparcener for partition against the other members of the family. The alienee could in no sense be described as a person in joint possession actually or even constructively along with the other members of the family. The proper course on transmission of the original plaintiff as a defendant is to call upon the transferee plaintiff to pay *ad valorem* court-fee on the share of the properties which he was claiming.

Where what the trial court did instead was to dismiss the suit on the merits and to direct at the end of the judgment the transferee plaintiff to pay additional court-fee within one month from the date of Judgment and in default that the plaint would stand rejected on that ground, *held* in an apeal by the transferee plaintiff : Section 12, sub-section (ii) of the Court Fees Act confers on the appellate court ample power to set right any mistake in procedure. The appellant can be ordered to pay the proper court-fee which he ought to have paid as calculated under Section 7 clause (v) of the Court Fees Act both on the plaint and memoradum of appeal and in can be directed that in default the appeal as well as the plaint should be rejected as not bearing the proper court-fee as far as the appellant was concerned.

Appeal against the decree of the Court of the Additional Subordinate Judge Bapatla, dated 11th November, 1943, in O. S. No. 21 of 1943.

K. Kameswara Rao for Appellant.

P. Satyanarayana Rao, P. Chandra Reddi, K. Venkataratnam, K. Krishnamurthi and *T. V. R. Tatachari* for Respondents.

The Government Pleader (*K. Kuttikrishna Menon*) on behalf of the Government.

The Order of the Court was made by

Rajamannar, J.—This appeal arises out of a suit filed originally by one Dharmaraju as the sole plaintiff for partition of properties set out in schedule A to E to the plaint and for separate possession, of a fourth share therein. Dharmaraju is one of the sons of the first defendant, defendants 2, 3 and 4 being the other sons. The suit was valued for purposes of jurisdiction at Rs. 5,100 but a Court fee of Rs. 100 was paid as the proper Court-fee on the plaint praying for partition of the family property by a member of the family. Subsequently Dharmaraju purported to convey his interest in the family properties to his father-in-law, who is the appellant before us, by a deed dated 19th August, 1940. The appellant thereupon filed I. A. No. 862 of 1940, to be impleaded as an additional plaintiff. This application was not opposed by Dharmaraju and was ordered on 10th October, 1940. The appellant was brought on record as the second plaintiff and Dharmaraju was described as the first plaintiff. The third defendant was, sometime later, transposed as third plaintiff. Eventually before the trial commenced there was a change of attitude on the part of the first plaintiff who apparently had fallen out with his father-in-law and joined his father, the first defendant. On the 27th October, 1943, he made an endorsement on the list of documents consenting to abide by the partition of 1940 which had been set up by the first defendant. Even prior to this date the first plaintiff had filed an application I. A. No. 375 of 1942 to strike off the name of the second plaintiff alleging that by undue influence he had obtained the assignment from him. That petition was dismissed by the learned Subordinate Judge and the dismissal was confirmed by this Court in revision. The second plaintiff therefore continued to remain as a plaintiff.

It cannot be denied and it is not disputed that the plaint as originally framed was properly valued and proper Court-fee had been paid on it. The mere fact

* Appeal No. 223 of 1944. 11th November, 1946.

that during the pendency of the suit the transferee from the first plaintiff was also added as an additional plaintiff would not, in our opinion, entail additional Court-fee on the ground that the alienee was not a person in joint possession of the suit properties along with the defendants. But when the first plaintiff decided not to prosecute the suit as originally laid by him and finally allowed himself to be transposed as a defendant on 27th October, 1943, clearly the nature of the suit became altered in a material degree. It ceased to be a suit for partition by one co-parcener against the other co-parceners. It became a suit by a person claiming to be an alienee from a coparcener for partition against the other members of the family. The alienee could in no sense be described as a person in joint possession actually or even constructively along with the other members of the family. From the moment the first plaintiff ceased to be on record as a plaintiff we are of opinion that the suit must be regarded as a suit by the second plaintiff as an alienee and as alienee he would not be entitled to the benefit of the special provision as regards Court-fee applicable to a coparcener in joint possession with other coparceners. The proper course which must have been adopted by the learned Subordinate Judge was immediately on the transposition of the first plaintiff as defendant, to call upon the second plaintiff to pay *ad valorem* Court-fee on the share of properties which he was claiming. This course was unfortunately not followed. On the other hand what the learned Judge did was to dismiss the suit on the merits and to direct at the end of the judgment the second plaintiff to pay additional Court-fee within one month from the date of judgment and in default that the plaint would stand rejected on that ground. There is no warrant for this procedure, but as the case has come up before us in appeal, section 12, sub-section (*ii*) of the Court-fees Act confers on this Court ample power to set right any mistake in procedure. The second plaintiff is the appellant before us and as we have held that the proper Court-fee which he ought to have paid is the Court-fee calculated under section 7, clause (*v*) of the Court-fees Act, we direct that he should pay court-fee calculated accordingly both on the plaint and on the memorandum of appeal to this Court, within two months from this date. In default not only will this appeal be rejected but the plaint will also likewise be rejected as not bearing the proper Court-fee as far as the second plaintiff is concerned.

The third plaintiff was originally the third defendant in the case. He is one of the sons of the first defendant and admittedly a member of the family. In his written statement he prayed that his share may separately be allotted to him. Subsequently he was transposed as the third plaintiff and after the transposition consequential amendments were made in the plaint. According to him he became divided in status in March 1934, and demanded partition but the first defendant set up a false case that he had already taken his share out of the division which took place in 1931. In paragraph 6 of his written statement he stated as follows:

> "There was never any division in the family by which this defendant became divided nor has this defendant been in possession of any joint family properties except the house portion mentioned, which too was used for his separate residence on account of domestic disputes and not as a result of partition."

We are unable to see any allegation of ouster or exclusion from enjoyment of joint family properties either in the written statement or in the amendment to the plaint after the third defendant's transposition as third plaintiff. The fact that in paragraph 6 he refers to the case set up by the first defendant, which he describes as false and according to which the plaintiff was not entitled to any partition, does not amount to an allegation that he is out of possession of the family properties. In the absence of a definite allegation that he is completely out of possession we do not think that we shall be justified in directing him to pay Court-fee under section 7, clause (*v*) of the Court-fees Act. We consider that the Court-fee of Rs. 100 paid by him is proper. He has preferred a memorandum of objection to this Court and we hold that he has paid proper Court-fee on the memorandum of cross objections also.

As we have granted time to the appellant to pay additional court-fee we think it proper that the memorandum of cross-objections should be heard at the next adjournment along with the appeal.

K.S. ——— *Additional Court-fee ordered to be paid.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Palli Munisami and another .. *Accused.**

Criminal Procedure Code (V of 1898), sections 562, 380 and 349—Submission by Sub-Magistrate of whole case and all accused to Sub-Divisional Magistrate where he considers and suggests that action should be taken under section 562 only against one or few of the convicted persons—Legality—Applicability of section 349 to such cases.

Sections 562 and 380 of the Criminal Procedure Code practically constitute in themselves a complete and self-sufficient machinery to meet cases where a Sub-Magistrate considers that only one or few of the convicted persons alone should be dealt with under section 562 and it is hardly necessary to invoke the aid of section 349 of the Cod to determine whether in such cases all the accused should be sent up or only the person or persons against whom action under section 562 is contemplated. The characteristic features of section 349 do not fit into a case arising under section 562. There is nothing in the language of sections 562 and 380 which prohibits a Magistrate of the second or third class sending up all the accused, the whole case and the entire proceedings to the Sub-Divisional Magistrate in a case where he suggests that action should be taken under section 562 against only one or few of the accused persons.

Case referred for the orders of the High Court, under section 438, Criminal Procedure Code, by the Additional District Magistrate, Chittoor, in his letter No. R. O. C. D. 2, 1630-46 dated 2nd September, 1946.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is a reference made by the Additional District Magistrate, Chittoor, under section 438 of the Code of Criminal Procedure in the following circumstances. Two persons were tried by the Stationary Sub-Magistrate, Tirupathi, in C.C. No. 813 of 1946 for offences of theft and receiving stolen property. The first accused, P. Munisami, aged 18 years, was convicted by the Sub-Magistrate under section 380 of the Code of Criminal Procedure in respect of the theft of a gramophone and a wireless set from the Military Stores, Renigunta. The se ond accused Krishniah was convicted under section 411 of the Indian Penal Code for having dishonestly received those two articles knowing them to be stolen. The Stationary Sub-Magistrate after convicting the two accused considered that the first accused being a first offender and an adolescent should be dealt with under section 562 of the Code of Criminal Procedure and in that view he forwarded the proceedings to the Sub-Divisional Magistrate, Chandragiri, for appropriate orders and in doing so he sent up both the accused to the Sub-Divisional Magistrate for being dealt with in accordance with law. The Additional District Magistrate considers that the legality of such a proceeding is not free from doubt in view of certain decisions of this Court and has solicited a definite ruling to meet cases of this kind.

The proviso to section 562 of the Code of Criminal Procedure enacts that where any first offender is convicted by the Magistrate of the third class or a Magistrate of the second class not specially empowered by the Provincial Government in this behalf and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect and submit the proceedings to a Magistrate of the first class or Sub-Divisional Magistrate, forwarding the accused to, or taking bail for his appearance before such Magistrate, who shall dispose of the case in a manner provided by section 380. Section 380 of the Code of Criminal Procedure is to the following effect:

"Where proceedings are submitted to a Magistrate of the first class or a Sub-Divisional Magistrate as provided by section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken."

These two sections practically constitute in themselves a complete and self-sufficient machinery to meet cases of this description and it is hardly necessary to invoke the

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* Cr. R. C. No. 960 of 1946. 29th November, 1946.
(Case Referred No. 33 of 1946).

aid of section 349 of the Code of Criminal Procedure to determine whether in such cases all the accused should be sent up or only the person against whom action under section 562 of the Code of Criminal Procedure is contemplated. Section 349 (1) lays down the procedure when a Magistrate cannot pass a sentence that he considers to be appropriate to meet the ends of justice in a case. He may in such a case forward the accused to the District Magistrate or Sub-Divisional Magistrate to whom he is subordinate. Sub-section (1-A) of that section reads:

> "When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-Divisional Magistrate."

Thus it will be seen that in this sub-section statutory provision has been expressly made requiring that in a case where the Magistrate has decided to take action under section 349 he must forward all the accused who are in his opinion guilty. In such a case he does not convict the accused but only records his opinion that the accused is guilty and submits the proceedings to the superior Magistrate. In such a case again the superior Magistrate has the right, either on a perusal of the record or on making further inquiry under sub-section (2) of the same section, to pass any order including an order of acquittal of all the accused. Obviously these characteristic features of section 349 do not fit into a case arising under section 562. In such a case the Magistrate before sending up the proceedings convicts the accused including the person against whom action under section 562 is sought. The superior Magistrate to whom the record goes has the power under section 380 to pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken. It has however been held by this Court that in such a case he cannot pass an order of acquittal against any of the persons sent up since the Magistrate who tried the accused and who has forwarded the case has already convicted the accused and the proceedings before the superior Magistrate are not in the nature of appellate proceedings—see *The Public Prosecutor v. Malaipathi Gurappa Naidu*[1]. It was apparently in this view that Byers, J., held in *Piramanaga Pandaram v. Emperor*[2], that section 349 (1-A) has no application to the procedure under section 562 of the Code of Criminal Procedure. That decision however cannot be deemed to have overruled the contention on an interpretation of sections 562 and 380 of the Code of Criminal Procedure that there is nothing in those provisions which precludes the convicting Magistrate from sending up the entire case or all the accused to the superior Magistrate. To put it in another way there is nothing in these sections which compels the Court to hold that the trying Magistrate is bound to send up only that person against whom action is required under section 562 and he must himself pass sentence upon the other persons who are not to be so dealt with. The consequences of Courts of different grades dealing with different accused in the same case are apparent. The case against one or some of the accused would have been dealt with by the second or third class Magistrate as the case may be and the accused would have been convicted. The case against the person dealt with under section 562 would have been dealt with by the Sub-Divisional Magistrate who would have passed sentence on that person. The appeal against the conviction awarded by the Sub-Magistrate would lie to the same Sub-Divisional Magistrate who had dealt with a part of the case while the appeal against the order of the Sub-Divisional Magistrate would lie to a higher Court and it is not unlikely that conflicting decisions might be the result with regard to the different accused persons in the same case. Unless therefore the language of section 562 compels an interpretation which must unavoidably lead to such anomalous results such a construction should be avoided. But it is not necessary to invoke this principle of construction because on a scrutiny of the language of the proviso to section 562 and the language of section 380 it is possible to find that such a result was not intended, *viz.*, to prohibit the trying

1. (1933) 65 M.L.J. 405 : I.L.R. 57 Mad. 85. 2. (1943) M.W.N. (Crl.) 9.

Magistrate from sending up, if he so chooses, all the accused whom he has tried including the persons against whom he recommends action under section 562. The proviso says that when a first offender is convicted by such a Magistrate and he is of opinion that the case should be dealt with under this section, he should submit "the proceedings" to the superior Magistrate forwarding "the accused" to that Magistrate who shall dispose of "the case" in manner provided by section 380. The words "the proceedings," "the accused" and "the case" occurring in section 562 seem to indicate that the forwarding of the entire proceedings, all the accused and the whole case is not either expressly or by implication excluded. Likewise in section 380 it is stated that the superior Magistrate when the records come to him may pass such sentence or order as he might have passed in "the case" originally heard by him. Here also the indication is that the possibility of the entire case going before the Magistrate was not ruled out. There is therefore nothing in the language of these two sections which prohibits a Magistrate of the second or third class sending up all the accused, the whole case and the entire proceedings to the Sub-Divisional Magistrate in a case where he suggests that action should be taken under section 562 against only one or few of the accused persons.

I may refer to three other cases bearing upon this issue which were decided in this Court. In *Emperor* v. *Narayanaswami Naidu*[1], Pandrang Row, J., was of opinion that section 349 applied to such a case. That view as I have already indicated is opposed to the decision of Byers, J., in the case cited above. Pandrang Row, J., however did not take into consideration the provisions of section 380 and did not have in that case to enter into a detailed examination of the language of sections 562 and 380 with a view to decide whether the principle of section 349 (1-A) rather than the provision itself is not implicit in the language of these two sections. The next case in *Emperor* v. *Mottiyan*[2] was decided by Lakshmana Rao, J. The first accused in that case was a juvenile and the trying Magistrate was not empowered to deal with him under the Madras Children Act and hence the records were sent up to a higher Magistrate. It was held that both the accused should be sent up and not the juvenile alone. This view found approval in the judgment of a Bench of this Court in *Subbiah Goundan*, In re[3]. That was also a case which arose under the Madras Children Act and the learned Judges held that the case fell within sub-section (1) of section 349 and that sub-section (1-A) should have been conformed to.

These two cases are not cases arising under section 562. So far as section 562 is concerned both that section and section 380 form part of the same Code and they provide the necessary machinery and in that view section 349 (1-A) may not in terms be directly applicable to such a case as has been held by Byers, J. But independently of section 349 (1-A), the language of sections 562 and 380, in my opinion, yields to the construction that what was intended was that if the Magistrate so chooses the entire proceedings, the whole case and all the accused may be forwarded. In any case it is not provided in these sections nor is it suggested by Byers, J., in his decision that such a course is repugnant in any manner to the language of sections 562 and 380.

In this view of the matter the action taken by the Sub-Magistrate in forwarding both the accused and the entire case records to the Sub-Divisional Magistrate is in accordance with law and the Sub-Divisional Magistrate should dispose of the case as provided in section 380 of the Code of Criminal Procedure. The reference is answered accordingly.

V.S. ——— *Reference answered.*

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1. (1936) M.W.N. (Crl.) 235.
2. (1941) M.W.N. (Crl.) 96.
3. (1945) M.W.N. (Crl.) 34.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR SIDNEY WADSWORTH, *Officiating Chief Justice* AND MR. JUSTICE RAJAMANNAR.

S. K. Sahul Hamid and another .. *Appellants**

v.

S. M. Sulthan and others .. *Respondents.*

Mahomedan Law—Co-heirs—Joint family firm—Custom—Dissolution of firm—Remedy of legal representative—Partnership Act (IX of 1932), section 37—Option of legal representative—Claim for share of assets only—Maintainability—Trusts Act (II of 1882), section 88—Applicability—Implied agreement for continuance of firm—Proof—Transfer of Property Act (IV of 1882), section 41—Essentials for applicability.

The Mahomedan Law does not recognise a joint family as a legal entity, and heirship does not necessarily go with membership of the family. In any particular case it can be proved that a Mahomedan family has adopted by custom having the force of law the joint family mode of holding property. But such a custom must be alleged with definiteness and proved. It is very unsafe to infer from the fact that certain Mahomedan families follow the social manners and habits of the Hindus that they are also governed by rules of Hindu Law.

The claim of a legal representative of a deceased partner against a surviving partner or partners under section 37 of the Partnership Act is either a claim for an account or a claim for a specific amount representing the deceased partner's share together with interest thereon. The option is given to the legal representative because the subsequent business might not have ended in profit in which case the legal representative can claim the value of the share with interest. If on the other hand, profit has been made, the legal representative can claim such share of the profit which he can attribute to the use of the share of the deceased partner. The legal representative cannot however sue for recovery of a share of the assets of the partnership without regard to the liabilities of the firm.

There is no fiduciary relationship between co-heirs or co-owners under Mahomedan Law as such. Where the property of a co-heir is managed by others both during and after his minority the theory of a constructive trust will be inapplicable for the period when such co-heir was not a minor and section 88 of the Trusts Act will not apply to such a case.

Where it is alleged that there was an implied agreement that a certain business carried on by Mahomedan co-heirs was for the benefit of all the members, it should be proved that all the members were intended to be benefited, and that there was a recognition of the rights of these members who did not in fact participate in the business.

In order to get the benefit of section 41 of the Transfer of Property Act the transferee should prove, that the transferor was the ostensible owner of the property, that the ostensible owner was holding the property with the consent, express or implied, of the real owner and that the transferee paid the consideration and acted in good faith after reasonably careful enquiry. Where the original title deeds are shown to have vested in all the co-owners the mere fact that later pattas contain only the names of some of them will not make the latter ostensible owners of the whole property. And where it is shown that the transferee was aware of the existence of other persons possibly having an interest in the property the theory of good faith is negatived.

Appeals against the decrees of the Court of the Subordinate Judge, Tinnevelly, in O. S. No. 40 of 1943 dated 25th September, 1944.

The Advocate-General (*K. Rajah Aiyar*), *S. K. Sundaram*, *S. Sitarama Aiyar* and *S. Rajaraman* for Appellants.

T. V. Muthukrishna Aiyar and *S. K. Ahmed Meeran* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, *J.*—This is an appeal by defendants 4 and 6 against a preliminary decree for partition made in favour of the first respondent by the Subordinate Judge of Tinnevelly. The plaintiff and defendants 1 to 13 are Mahomedans and alleged to be co-sharers. The other defendants are alienees from some of the defendants of portions of the properties in suit. The plaintiff claimed that he was entitled to 19/240th share in the properties set out in the schedules to the plaint.

Though there was some contest in the trial Court, there was no dispute before us about the relationship between the plaintiff and defendants 1 to 13. One Pakkiri Taragan had four sons, Alliyar, Sheik Uduman, Syed Ahmed and Ghosu Muhammad and a daughter Kathija. Alliyar married one Nagoor Meeral and by her he had a son Syed Ahamad and a daughter Mukkuthi. The plaintiff is the husband of Mukkuthi. Nagoor Meeral, before she married Alliyar, was the widow

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* Appeals Nos. 21 and 85 of 1945. 20th September, 1946.

of one Abu Bucker, by whom she had a son named S. M. Muhammad. Sheik Uduman, the second son of Pakkiri, was married to the seventh defendant. The first defendant is his son and the eighth and ninth defendants are his daughters. Syed Ahamad, the third son of Pakkiri, was married to the tenth defendant. The second and third defendants are his sons and the eleventh and twelfth defendants his daughters. The third defendant died *pendente lite* and defendants 36 to 39 were added as his legal representatives. Ghosu Muhammad, the fourth son, had three sons, defendants 4, 5 and 6 and a daughter, the 13th defendant.

Pakkiri died in 1903. There is no reliable evidence as to the properties left by Pakkiri. Alliyar died on 25th January, 1905. There is documentary evidence that by the date of his death, immoveable properties worth about Rs. 7,000 had been purchased in his name and in the names of his three brothers (*vide* Exs. P-1 to P-4, D. 8-g, D. 9-n and D. 11-y). The extent of land covered by these deeds was about four acres and a half. Alliyar's son Syed Ahamad and his daughter Mukkuthi continued to live with their uncles and in 1913 Mukkuthi was married to the plaintiff. In 1914, Alliyar's widow Nagoor Meeral died, and next year, *i.e.*, in 1915, Alliyar's son Syed Ahamad died. In 1918, Mukkuthi, the plaintiff's wife, died issueless.

During the period between 1905 that is the date of Alliyar's death, and 1915, the year of Syed Ahamad's (Alliyar's son's) death, certain immoveable properties were purchased in the name of the three brothers of Alliyar and Syed Ahamad, the son of Alliyar. Ex. P-6 series relate to such purchases and they comprise a total extent of five acres 31 cents wet and 5 cents dry.

Though the members of the family resided at Melapalayam in the Tinnevelly district, there is evidence to show that even during the lifetime of Alliyar there was a business in cloth and carpets with branches at Rangoon and at Cuddalore (*see* Ex. P-12). The name of the firm was S. P. A. Sheik Uduman and Brothers. Though there is no documentary evidence of the fact, it is alleged that besides cloth and carpet business, there was also a flourishing business in oil carried on in Rangoon. Syed Ahamad, the third son of Pakkiri, died in 1918, Ghosu Muhammad, the fourth son, in 1934 and Sheik Uduman, the second son, in 1941. After the death of Alliyar's son Syed Ahamad, several purchases of immoveable properties were made between 1916 and 1930. The sale deeds were taken only in the names of the surviving sons of Pakkiri and the sons of the deceased brothers other than Alliyar. Mukkuthi, the daughter of Alliyar, was not a party to any of the transactions in her lifetime, though it must be also mentioned that no other female member of the family is a party to any of the transactions. The plaintiff was the heir of his wife Mukkuthi but his name admittedly does not find a place in any of the documents. It is common ground that the plaintiff was employed in the business carried on in Rangoon till at least 1933. He was being paid a salary and he held a power of attorney (Ex. D-3) executed in his favour by Sheik Uduman, Ghosu Muhammad and the son of Syed Ahamad (third son of Pakkiri). The vilasam of the business carried on in Rangoon and Cuddalore which was originally S. P. A. Sheik Uduman and Brothers was changed in 1926 into S. P. Sheik Uduman and Brothers, the significant alteration being the dropping of the letter "A" (which most likely stood for Alliyar). Another event which happened in 1926 may be now mentioned—an event which probably was the immediate cause of the change in the vilasam. S. M. Muhammad, the step-son of Alliyar, brought a suit in the High Court of Judicature at Rangoon (Civil Regular No. 102 of 1926), against Sheik Uduman, Ghosu Muhammad and Ahamad Ali, the son of Syed Ahamad, for a dissolution of a partnership and claiming Rs. 75,000 as the sole heir of Nagoor Meeral. The defence appears to have been raised that Alliyar himself was not the son of Pakkiri and it was also pleaded that Muhammad himself was not the son of Nagoor Meeral. Both the pleas were false, evidently put forward to defeat the claims of S. M. Muhammad at any cost. It is in evidence that the plaintiff himself was entrusted with the conduct of the suit and was evidently also interested in defeating S. M. Muhammad's claims. The suit, however, was compromised and Muhammad's claims were settled at a sum of Rs. 19,000.

Apparently the affairs of the firm were not very satisfactory in the year 1931. On 18th June, 1931, a document (Ex. P-20) called a partition agreement, was executed by (1) Sheik Uduman, (2) Ghosu Muhammad, (3) Ahamad Ali, and (4) S. S. Abdul Rahiman, (3) and (4) being the sons of Syed Ahamad. The recitals in this document are important and have been relied on by both sides. The document starts by saying that the individuals (1) and (2) and their brother the late Syed Ahamad, the father of individuals (3) and (4) jointly started a business at Cuddalore and Rangoon, etc., under the common vilasam of S. P. A. Sheik Uduman and Brothers which was since changed into the common vilasam of S. P. Sheik Uduman and Brothers in 1926, and that with the income derived by the said business, properties were purchased originally in the names of the three brothers and after the death of Syed Ahamad in the names of the four executants and also solely in the name of the first executant. Then we have the statement,

"We have been enjoying them in common as members of a joint family and as properties of the joint family."

It is then recited that the Melapalayam accounts were settled up to the end of 16th December, 1930, and the Rangoon and Cuddalore accounts up to the 31st December, 1930. The business carried on in Rangoon and Cuddalore was not disturbed and the only arrangement made was that the total capital of the firm was divided into three shares and entered in favour of the respective sharers separately. Paragraph 3 of the deed reads as follows :

"In this circumstance, we intended to divide and get separate possession of the other immoveable and moveable properties, etc., belonging to us, exclusive of the joint business carried on amongst us and the immoveable and moveable properties pertaining to it, and accordingly and in pursuance of the agreement regarding partition, we amicably effected a partition amongst us of all the moveable properties and cattle, and each of us has been enjoying those which have fallen to his respective share."

In paragraph 4 reference is made to the debts payable in the common account of Melapalayam and to an arrangement between the parties by which the respective sharers had separately executed documents. There is a provision for the distribution of the Melapalayam outstandings and the document finally recites that the moveable properties and cattle have already been partitioned. The schedule sets out the immoveable properties and outstandings which have to be partitioned. It is in the immoveable properties which form the subject-matter of this partition agreement that the plaintiff claims his share, though it is clear that this transaction does not recognise any claim in the plaintiff.

The Rangoon business eventually ended in a failure and the partners were adjudged insolvents in 1936. It appears that a composition scheme among the creditors was approved by Court and a decree was obtained subsequently in pursuance of that scheme by the Official Assignee of Rangoon.

The plaintiff claims a share as the heir of his wife Mukkuthi and the suit is framed as if it was a suit for partition of properties belonging to the co-sharers consisting of plaintiff and defendants 1 to 13. But as the claim includes within its scope a share to properties acquired after the death of Alliyar, Syed Ahamad, Nagoor Meeral and Mukkuthi, the plaintiff is compelled to make allegations of fact and law to support such a claim. These allegations, however, are so vague, indefinite and inconsistent that it is difficult to discover any one logical and legal basis. It is therefore necessary to examine in some detail the several allegations in the plaint.

In paragraph 6 of the plaint the plaintiff states that at the time of the death of Alliyar, his children were minors and hence the three brothers of Alliyar were looking after them and their mother Nagoor Meeral and were also in common management of the entire properties of the family and carrying on the family trade. Then occur the following averments which are important :

"Even though they were Mahomedans, they were following the principles, manners and customs similar to those of the members of a Hindu family, and further, the trade also was being carried on in the same manner, as if it was for the benefit of all the sharers. Even though the heirs of Alliyar are not entitled to lay any claim to the aforesaid trade as shareholders (partners?) therein,

it is necessary, in consideration of the usage, law and equity, to give to the heirs of Alliyar one-fourth share in the properties subsequently purchased from out of the aforesaid assets, inasmuch as the subsequent trade was conducted by making use of the assets of the previous trade and of the security and facilities of the common property. The aforesaid trade was being conducted for the said persons also."

It is impossible to imagine a pleading more confused and jumbled than this. Totally different legal principles are relied on though they are not kept separate. Firstly, there is the plea that though they are Mahomedans there is a special custom or usage according to which they are governed by the principles of Hindu Law. Secondly, there is the plea that the business was carried on by some of the co-sharers for the benefit of all the sharers. Thirdly, though it is admitted that the heirs of Alliyar were not partners in the business, it is said that according to law and equity and the usage, they are entitled to a quarter share. But this plea is mixed up with what looks like a plea based on section 37 of the Partnership Act and section 88 of the Trusts Act.

In subsequent paragraphs of the plaint, we find what appear like additional pleas. In paragraph 9, the plaintiff alleges that after the institution of the suit by S. M. Muhammad in Rangoon, Sheik Uduman and others assured him that he would be paid a certain amount by way of salary and he would also be paid a share of two annas in the profits besides being given a share in the properties in India. He says that he also entertained the belief that he would be getting a share in his capacity as a shareholder in the partnership also. In paragraph 10 referring to defendants 2 and 3 and 11 and 12, the children of Syed Ahamad, the plaintiff makes the following averment :

"The aforesaid heirs did not get their shares divided and receive them, but with views similar to those of the Hindus, they remained under the family management of their senior paternal uncle."

In paragraph 12, an express agreement is pleaded, namely, that the father of the first defendant and others promised him that so far as his share was concerned, since he had some connection with the trade, what was due to him (plaintiff) would be "set apart through the same," after ascertainment thereof and on settlement of account as between the shareholders. This statement is followed up in paragraph 13 by the statement that they gave him (plaintiff) some amounts from the assets of the trade.

Paragraph 14 contains an attack on the partition of 1931. Therein also he repudiates liability for any debts payable by the firm as according to him the assets of the trade were more than sufficient for them. There are also allegations which suggest that from 1931 at any rate, he is not interested either in the profits or loss or in the debts or capital pertaining to the business conducted subsequently. He winds up by saying that only in the immoveable properties mentioned in the partition deed as well as in the plaint the plaintiff has to get his share after partition. In paragraph 15, the plaintiff says that he is in constructive possession along with defendants 1 to 5. The cause of action is given as February-March, 1942, when the defendants refused the plaintiff's demand for partition. The prayer is for a decree declaring the plaintiff's 19/240th share in the scheduled properties and directing partition thereof and delivery of separate possession of his share to him together with mesne profits from the date of plaint to the date of possession.

The main difficulty in deciding the case is due to the confused and mixed up pleadings in the plaint. The plaintiff's allegations were all denied in the written statements of defendants 1 to 3 and others. The issues however, as happens very often, do not serve to bring out the material questions of law and fact.

Prima facie the plaint as framed is for partition by a sharer against his co-sharers in respect of joint undivided property. The basis of the plaintiff's claim is his heirship to his deceased wife Mukkuthi and if his claim were only to a share in the properties left by Mukkuthi, there would not be much difficulty except perhaps on account of a possible plea of limitation. But as the plaintiff's claim comprises properties acquired long after the death of Mukkuthi, the plaintiff is compelled

to resort to other grounds to sustain his claim. It is better in the interests of clarity, that his several pleas are taken up and considered separately.

There is no doubt that if the parties had been governed by the Hindu Law according to Mitakshara and had constituted a joint Hindu family, and the business that the members of the family were carrying on had been an ancestral business and the properties in suit had been acquired in the course of and from and out of the profits of the business, then the properties would become the assets of the joint family in which every member of the joint family would have a share. But it is now well established that the Mahomedan law by which *prima facie* the parties in this case are governed, does not recognise such a system of holding property and the principle on which that system is founded cannot be applied to the determination of questions relating to the tenure and devolution of property among Mahomedans. Mahomedan heirs take their shares in severalty and they are deemed to be tenants in common without any right of survivorship. The Mahomedan law does not recognise a joint family as a legal entity. In fact, according to the rules of the Mahomedan Law of Succession, heirship does not necessarily go with membership of the family. There are several males and females who have no interest in the heritage but may be members of the family. On the other hand, there are several heirs like, for example, married daughters of a deceased male owner who take an interest in the estate but form no part of the family. (Vide *Abdul Khader* v. *Chidambaram Chettiar*[1] and *Shakrullah* v. *Zohra Bibi*[2].)

It is also well established that in any particular case it can be proved that a Mahomedan family has adopted by custom having the force of law the joint family mode of holding property; but such a custom must be definitely alleged and established. In this case we consider that no such custom has been pleaded with any definiteness. It has not been alleged that any particular rule of Hindu law has been adopted by custom or usage by the family of the plaintiff and defendants 1 to 13. Nor has it been alleged that there is a general custom or usage in the locality. There is no issue on this question and no evidence led in respect of it. The loose omnibus averment in paragraph 6 of the plaint, namely, "even though they were Mahomedans, they were following the principles, manners and custom similar to those of the members of a Hindu family" cannot be adequate as a plea of a custom at variance with the law. We may also mention that it is very unsafe to infer from the fact that certain Mahomedan families follow the social manners and habits of the Hindus that they also are governed by the rules of Hindu law. We are therefore clearly of opinion that this plea does not avail the plaintiff.

The plaintiff must then be able to support his claim by relying on some known principles of general law. There are scattered in the several paragraphs of the plaint allegations which may be used to support a case founded on the law of partnership and the law relating to constructive trust. Taking partnership first, it is clear that the plaintiff does not found his case on a claim to be a partner along with defendants 1 to 3 and their deceased predecessors. There is further a specific averment in paragraph 6 that the heirs of Alliyar are not entitled to lay any claim to the trade as shareholders therein. It follows that if there is any plea which falls within the sphere of partnership law, it must be based on the principle enunciated now in section 37 of the Partnership Act. Alliyar, according to the plaintiff, was one of the partners along with his three brothers. When he died there was no settlement of account but the surviving brothers continued the trade retaining the share of Alliyar in the assets of the firm and presumably making use of such share in the subsequent conduct of their business. Section 37 of the Partnership Act is as follows:

"Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of

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1. (1908) I.L.R. 32 Mad. 276. 2. (1932) I.L.R. 54 All. 916.

himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm."

(The proviso is not material in this case).

The implication of illustration (*f*) to section 88 of the Trusts Act is similar in effect. It is as follows:

"*A* and *B* are partners. *A* dies. *B* instead of winding up the affairs of the partnership retains all the assets in the business. *B* must account to *A's* legal representative for the profit arising from *A's* share of the capital."

The plaintiff does say in paragraph 6 that the subsequent trade was conducted by making use of the assets of the previous trade and with the security and facilities of the common property.

In our opinion there is a fatal objection to this plea. It is clear that the claim of a legal representative of a deceased partner against a surviving partner or partners under section 37 of the Partnership Act is either a claim for an account or a claim for a specific amount representing the deceased partner's share together with interest thereon. The option is given to the legal representative because the subsequent business might not have ended in profit in which case the legal representative can claim the value of the share with interest. If, on the other hand, profit has been made, the legal representative can claim such share of the profit which he can attribute to the use of the share of the deceased partner. The present suit as framed is not for an account. The prayer is definitely for a partition of specific immoveable properties and there are even allegations here and there which completely negative the possibility of construing the plaint as containing a prayer for an account. What the plaintiff claims is a share in some of the assets of the business assuming that all the properties were acquired with the moneys of the partnership but the plaintiff does not admit that he is bound by the liabilities of the firm. What section 37 speaks of is a share of the profits made and not a share of the assets only, completely leaving the liabilities out of account. The plaintiff by claiming a partition only of the assets, cannot support such a claim on the provisions of section 37 of the Partnership Act. According to the plaintiff it was the trade which was carried on in Rangoon and Cuddalore that was the source of the money which went to the purchase of the properties now in suit. There is ample evidence to indicate that the business eventually ended in a loss and there were considerable debts payable by the partnership which ultimately led to an insolvency. The plaintiff cannot simply claim a share of the immoveable properties which only represent the assets of the partnership without reference to the liabilities. It may be, on a proper taking of account, the partnership did not end in a profit in which case the plaintiff would not be entitled to anything on this footing. In any event whatever be the motive of the plaintiff in pursuing the present course, his claim to a share of the immoveable properties alone is unsustainable if the claim is based under section 37 of the Partnership Act. He should have prayed for an account after exercising the option given to a representative under section 37 of the Partnership Act. This he has not done.

The learned Advocate-General strongly urged that the suit is barred by limitation because Article 106 of schedule I to the Indian Limitation Act gives only a period of three years from the date of dissolution to sue for an account and share of the profits of a dissolved partnership. We do not think it necessary to deal with this aspect of the case because the suit as framed is not for an account of a dissolved partnership. It may be, that the plaintiff framed his plaint in this manner because he was afraid that he would be met by the plea of limitation. We do not think it necessary to examine the hypothetical question, *viz.*, whether the suit would not have been barred if the plaintiff had framed the suit properly.

Besides the contention based on section 37 of the Partnership Act, there is also a contention based on section 88 of the Trusts Act. The class of persons affected with the constructive trust declared in that section takes in trustees, executors, partners, agents, directors of a company, legal advisers or other persons bound

in a fiduciary character to protect the interests of another person. We have already dealt with the case of partnership. The brothers of Alliyar and their sons who were carrying on the business do not fall within the category of persons specifically mentioned in section 88 of the Trusts Act. The question therefor is whether they are persons bound in a fiduciary character to protect the interests of another person or other persons. No doubt they are co-sharers along with the children of Alliyar and subsequently with the plaintiff. But it has been held that there is no fiduciary relationship between co-heirs or co-owners under the Mahomedan law as such (vide *Abdul Samad Khan Khiladar* v. *Bibijan*[1] and *Abdul Khader* v. *Chidambaram Chettiar*[2]). The only other way of spelling out a fiduciary relationship is by relying on the allegation that when Alliyar died, his children were minors and hence the other three brothers were keeping in their own family the aforesaid persons and their mother, were maintaining them and were carrying on the trade for their benefit also. There is authority for inferring a fiduciary relation in such circumstances. In *Kathoom Bi* v. *Abdul Wahab Sahib*[3], the principle of section 88 of the Trusts Act was invoked in aid of the daughter of a deceased Mahomedan who left behind him a prosperous business which was continued by his three brothers after his death. The daughter was a minor when her father died and she was entitled to a half share in her father's estate. The father's brothers took charge of all the assets of the business and continued to carry it on. Several properties were acquired with the profits thereof. The daughter claimed a half share in the profits made out of the business after her father's death. The learned Chief Justice and Abdur Rahman, J., held that the father's brothers stood in a fiduciary position to the daughter because she was a minor living with them under their care and control and they even claimed to be her legal guardians. They were therefore bound to account in full. The fact that they were co-owners of the estate of the deceased did not affect their liability as guardian. The facts however of the present case do not permit the application of section 88 of the Trusts Act to support the claim of the plaintiff in its entirety. Mukkuthi was married to the plaintiff in 1913 and from that date she cannot be said to be under the guardianship and control of her father's brothers. Further, she herself died in 1918. Syed Ahamad, the son of Alliyar, was no doubt a minor on the date of his father's death but apparently he attained majority before he died in 1915. In any event, after 1918, there was no person in existence in Alliyar's branch in respect of whom Shaik Uduman and his brothers and their sons could be said to have occupied a fiduciary position. The plaintiff was a major and certainly was not under their care and protection. It may be that as persons occupying a fiduciary position they would be under a liability to account for their management till 1918 at the latest, when Mukkuthi died. But thereafter there would be no fiduciary relationship between them and the plaintiff and taking a view most favourable to the plaintiff it may be said that the plaintiff, as the heir and representative of his wife, could claim to be entitled to be treated as a creditor only as regards the share which Mukkuthi could have claimed against them.

There is however a more formidable objection to the plaintiff's claim on this basis, an objection similar to that already dealt with under section 37 of the Partnership Act, that is, that even applying section 88 of the Trusts Act to the facts of the case, what the plaintiff would be entitled is to claim a full account of the management of Sheik Uduman and others. This, the plaintiff has not chosen to do. It must also be mentioned that so far as the appeal itself is concerned, the items which the appellants seek to exclude from any liability for partition are all items acquired after the death of the plaintiff's wife in 1918, that is to say, items acquired at a time when there was no fiduciary relationship between the plaintiff and the surviving brothers of Alliyar and their sons.

As we consider that the plaintiff has not framed the suit properly by praying for an account, it is unnecessary to go into the question raised on behalf of the

1. (1925) 49 M.L.J. 675.
2. (1908) I.L.R. 32 Mad. 276.
3. (1939) 2 M.L.J. 208.

appellants by the learned Advocate-General that a suit for an account would be barred under Article 120 of schedule I of the Indian Limitation Act as it has been filed more than six years after the right to sue accrued to the plaintiff and the plaintiff's rights were denied. The learned Advocate-General suggested 1926, the date of S. M. Muhammad's suit, and 1931, the date of the partition agreement Ex. P-20 as plausible dates for the starting point under that Article. On the other hand, Mr. T. V. Muthukrishna Aiyar for the plaintiff-respondent, relied on the ruling of the Judicial Committee in *Annamalai Chettiar* v. *A. M. K. C. T. Muthukaruppan Chettiar*[1] and contended that it is for the defendants to specify a particular date on which they denied the plaintiff's right to an account and as the defendants are not in a position to specify the particular date, the claim must be deemed to be in time. As already stated, it is unnecessary for us to decide this hypothetical question which does not arise in the plaint as framed.

We finally come to a plea which is based neither on partnership law nor on the law of constructive trust, but rests on some kind of implied agreement between all the members of the family that the members carrying on the business should carry it on for the benefit of all the members and on the understanding that all the sharers shall be entitled to the properties acquired in the business according to their shares under the Mahomedan law. The learned Subordinate Judge apparently found in favour of the plaintiff on this plea.

Considerable support for this plea is sought from two decisions of this Court and it is necessary to deal with them. The earlier of the decisions is reported in *Hussain Sahib* v. *Hassan Sahib*[2]. In that case the parties were Mahomedans and the descendants of one Abdul Razack. He had four sons who partitioned in 1818. Two of the sons started a business in South Kanara which was carried on down to the date of the suit by the two brothers and their descendants. Various properties were acquired in the name of one or other of the senior members of the family and all the members of the family were maintained out of the income of the family and the profits of the business. The accounts were being kept in the names of the representatives of the senior and junior branches. For a period of 60 years there was evidence of a uniform course of conduct pursued by both the branches. There was no direct evidence of any specific agreement as to the terms on which they were to carry on the business. The question was what was the appropriate inference to be drawn from the conduct as disclosed by the evidence. The case originally was heard by Sadasiva Aiyar, J., and Tyabji, J., who differed and the Letters Patent Appeal was heard by a Bench consisting of Sir John Wallis, C.J., Oldfield and Seshagiri Aiyar, JJ. The learned Judges held that for a long series of years the two branches lived and traded on the footing that they were entitled to equal shares in all the properties as well as in the business. The learned Judges make it clear that the family being a Mahomedan family was in no way bound by the rules of Hindu law but they took into account with the rest of the evidence the fact that the parties belonged to the class of "Navayats" who conformed to Hindu custom and manners to a very great extent. We consider that there is no general legal principle which can be deduced from this decision which can apply to the facts of the present case. After all, as the learned Chief Justice in that case observed at page 838 "Every case, however, must stand on its own circumstances." There is nothing in this case similar to the large body of evidence adduced in that case of a uniform course of conduct pursued for over 60 years by the descendants of the two branches. Because on the evidence before them, the learned Judges in that case drew a particular inference the plaintiff in this case cannot ask us to draw a similar inference from evidence which differs considerably from the evidence before the learned Judges in that case. In the present case there is no evidence of any recognition of the rights of the plaintiff at any time. No doubt the plaintiff speaks about assurances and promises but we have only his word for them. The documentary evidence entirely negatives any recognition of his right. On the

1. (1930) 60 M.L.J. 1 : L.R. 58 I.A. 1 : I.L.R. 8 Rang. 645 (P.C.).
2. (1917) 5 L.W. 835.

evidence placed before us it is impossible to hold that Sheik Uduman and his brothers were carrying on the business not only for themselves but also for the heirs of their deceased brother Alliyar.

The next case is *Abdul Rahim* v. *Abdul Hakim*[1]. It was there held by Wallace and Krishnan Pandalai, JJ., that the adult heirs of a deceased Mahomedan who founded a trade may carry on the same as a family trade for the benefit of all the members of the family including minors and females. In such a case the Court will not import into it all the legal consequences which would follow from such a family trade when it is conducted by a Hindu joint family or all the legal consequences of a lawful partnership. It is a question of fact in each case whether the relationship between such adult heirs and the rest of the family is one of debtor and creditor, or one of co-ownership, or one of trustee and *cestui que trust*. There was a large volume of evidence in that case and in our opinion every one of the findings of the learned Judges must really be deemed to be a finding of fact and not of law.

For instance at page 551, Wallace, J., observes as follows :

> "Here again it is a question not of law but of fact, and to our minds it is quite clear from the facts we have set out that the first defendant was assuming a position much more of trust than of a mere co-owner, and that he came into possession of the assets of the other members, not because of his co-ownership but because of the fiduciary relationship he adopted towards them, into which he entered on their behalf."

There are two things about this case which are not without significance : (1) that the suit out of which the appeal before the learned Judges arose was for an account and a division of the profits of the trade carried on by the first and second defendants ; and (2) the learned Judges, after dealing with the evidence, held that till a particular dat , *i.e.*, 1915, the first and second defendants must be deemed to have carried on the business as a family trade but thereafter the relationship between them and the other members of the family was not a fiduciary one and that the use by them of the share due to their mother in the trade could only be as capital lent for which they were liable to pay interest. In the present case, the plaintiff has not done the right thing by asking for an account and whatever might be said about the position of affairs till the death of Mukkuthi, after that date the brothers of Alliyar could not be deemed to be carrying on the business on behalf of the plaintiff.

The decision of a Division Bench of the Allahabad High Court in *Shukrullah* v. *Zohra Bibi*[2] was also relied on by the learned advocate for the plaintiff-first respondent. So far as the general propositions of law are concerned, this case does not take us further than the decisions of our Court. We may however mention in passing that surprisingly the learned Judges referred to the differing judgment of Sadasiva Aiyar, J., in the appeal but did not make any reference whatever to the judgment of the three learned Judges in the Letters Patent Appeal in *Hussain Sahib* v. *Hassan Sahib*[3]. The learned Judges held that for the determination of the rights of members of a Mahomedan family, any analogy drawn from the Hindu joint family system is misleading. There is a comprehensive statement of the law at pages 930 and 931 :

> "It is only in a loose sense that property is said to belong to a joint Mahomedan family. The law does not recognise a Mahomedan joint family as a legal entity, and has not provided rules applicable to the family as such. The rights of its individual members both as regards the original joint property and its subsequent enlargements, must be determined by an appeal to general law . . . . In the generality of cases in which Mahomedans belonging to the same family live in commensality, own property as tenants in common, carry on business jointly and make fresh acquisitions, their rights and those of their heirs can be determined with reference to express or implied agreement, relation of principal and agent, partnership, constructive trust, or the like . . . . Mere *a priori* conclusions based on the analogy derived from the law applicable to joint Hindu families, if they cannot be shown to be in conformity with a definite rule applicable to Mahomedans cannot be accepted."

We respectfully agree with these observations. But the decision in so far as it depended on the facts peculiar to that case cannot obviously apply to the present case. For the learned Judges observe at page 931 as follows :

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1. (1930) 61 M.L.J. 139 : I.L.R. 54 Mad. 543.
2. (1932) I.L.R. 54 All. 916.
3. (1917) 5 L.W. 835.

"The fact that all the male descendants of Hingan had joint residence, mess, property and business for several generations and made acquisitions from time to time with joint funds is not conclusive as regards the right of every heir to every propositus, however high, in the properties subsequently acquired by the surviving male members with the aid of the profits of the property left by the ancestor. There may be circumstances which entitle an heir to no more than his share of the property as it was at the time of his ancestor's death."

We must also point out that though the plaintiff may be the heir of his wife and therefore a co-sharer in property available for division between all the heirs of the four sons of Pakkiri he is in no sense a member of the family of Pakkiri.

We disagree therefore with the conclusion arrived at by the learned Subordinate Judge that the plaintiff is entitled to a share in the business carried on by Sheik Uduman and others after 1918 and properties acquired in the course of such business. This conclusion of ours is sufficient for the appellants in this case who only desire to exclude the properties which form the subject-matter of the appeal from a division, because they were acquired after 1918, *i.e.*, after the death of plaintiff's wife. In the trial Court the defendant appears to have conceded that Mukkuthi, the plaintiff's wife, was entitled to her share in the properties purchased before 1913 and standing in the name of Alliyar and his son Syed Ahamad. This concession will not however affect the appellant's case as regards the items in appeal. Clearly, in our opinion, the plaintiff can in no sense be deemed to be a co-owner with the defendants in the items in appeal.

We are now faced with an objection based on the omission by the appellants to add as parties to the appeal all the co-sharers. Only the plaintiff and defendants 5 and 13 have been made respondents. The other members of the family have not appealed against the decree for partition made against them. It was mentioned to us that they have entered into a compromise with the plaintiff.

But the question is whether the appellants can be given any relief in the absence of the other co-sharers. No doubt both in a suit for partition of a joint family and a suit for a partition of undivided property among tenants in common as well as in an appeal from the decrees in such suits, all the coparceners or tenants in common should be made parties. Otherwise there would be difficulties in adjusting the equities between the parties. We consider, however, that the objection is not so formidable in a case like the present. What the appellants now claim is that certain properties in their possession ought to be excluded from the operation of the decree for partition in favour of the plaintiff. Moreover, in this case there is no decree for a general partition among all the co-sharers. The decree only directs that the plaintiff may be awarded 19/240th share of the properties in the plaint schedules after excluding certain items in the possession of alienees. The result of the success of the appellants would be that the plaintiff would be entitled to a decree for partition in properties other than the items which are the subject-matter of the appeal. It may be that the result of the appellant's success in the appeal will necessitate an adjustment *inter se* between them and the other sharers. But that is not a matter which calls for a decision in this case.

There is also the further question whether in the view we have taken that the proper course for the plaintiff was to have claimed an account and the suit as framed was not maintainable, the decree in favour of the plaintiff should be allowed to stand in respect of properties not covered by the appeal. The other defendants have not preferred any appeal; they appear to have accepted the decree of the lower Court and entered into a compromise. We do not, in the circumstances, therefore, consider that we should set aside the decree in so far as it has become final between the plaintiff and the defendants who are not before us. As already mentioned above, in the trial Court it appears to have been even conceded that the plaintiff would be entitled to a partition of properties left by Pakkiri and Alliyar and the properties standing in the joint name of the three surviving sons of Pakkiri and Alliyar's son Syed Ahamad.

We therefore allow the appeal and modify the decree of the trial Court by excluding therefrom the items in appeal. The appellants will be entitled to their costs from the first respondent in this Court.

APPEAL No. 85 of 1945: JUDGMENT.—This appeal which arises out of the same suit as that out of which Appeal No. 21 of 1945 arose, is by defendants 19, 28 and 32. They are alienees of certain items of schedules II and III to the plaint. The plaintiff is the contesting first respondent. The facts which led up to the suit have been fully set out in our judgment in Appeal No. 21 of 1945, delivered on the 12th September, 1946.

The 19th defendant purchased item 2 of schedule II from the two sons of Syed Ahmed, the third son of Pakkiri, on 29th July, 1935, under Ex. D-10 and items 21 to 24, 38, 42 and 45 of schedule III from Sheik Uduman, the second son of Pakkiri on 29th September, 1935, under Ex. D-9. Out of these items, item 24 of schedule III was purchased originally on 28th June, 1928, under Ex. D-9 (*b*) by Sheik Uduman, Ghosu Mohamed and the two sons of Syed Ahmed. Items 21, 22 and 42 of schedule III were purchased under Ex. D-9 (mm) on 22nd July, 1916, by Sheik Uduman, Syed Ahmed, and Ghosu Mohamed. So far as these four items are concerned, the plaintiff's suit must fail according to the judgment delivered by us in Appeal No. 21 of 1945. These are not items purchased either during the time of Alliyar or of his son Syed Ahmed but after their death and long after Mukkuthi married the plaintiff. Any claim by the plaintiff to those items can be supported only under section 37 of the Partnership Act or under section 88 of the Trusts Act. In either case the relief which the plaintiff would be entitled to is an account of the management by the three surviving brothers of Alliyar and their sons and not partition simpliciter. The suit is not maintainable so far as these items are concerned and the appeal must succeed to that extent.

There is no evidence when item 2 of schedule II was purchased. The only evidence on record in respect of this item is a patta in 1908 which stood in the joint names of Alliyar, Sheik Uduman and Syed Ahmed. No subsequent patta or other document of title is available for this item.

Items 23 and 38 of schedule III were purchased under Ex. D-9 (*y*) on 3rd March, 1909, by Sheik Uduman, Syed Ahmed, Ghosu Mohamed and Alliyar's son Syed Ahmed. Item 45 of schedule III was purchased by the same persons on 22nd June, 1911, under Ex. D-9 (*z*). All these three items are found along with others in a patta dated 1st June, 1916, in favour of the said four persons, *i.e.*, including Alliyar's son, Syed Ahmed. In 1917, however the patta contains only the names of Sheik Uduman, Syed Ahmed, Ghosu Mohamed. Syed Ahmed, the son of Alliyar, had died in the meanwhile but his heirs are not mentioned (Ex. P-5-g). In 1923, the jamabandi chitta in respect of these items is in favour of Sheik Uduman, Ghosu Mohamed, the two sons of Syed Ahmed and two female members of the family Mariam Bivi and Muhammad Bathummal. All these four items, *i.e.*, item 2 of schedule II and items 23, 38 and 45 of schedule III were dealt with in the partition of 1931 as belonging exclusively to Sheik Uduman, Ghosu Mohamed and the two sons of Syed Ahmed. Item 2 of schedule II was allotted to the share of the two sons of Syed Ahmed while the other items were allotted to Shiek Uduman.

So far as these four items are concerned, *prima facie* the plaintiff would be entitled to his share in them as the heir of Mukkuthi. The 19th defendant in answer to the plaintiff's claim relies on the provisions of section 41 of the Transfer of Property Act. This section embodies the well-known equitable doctrine of holding out which was laid down as follows by the Privy Council in *Ram Coomar Koondoo* v. *McQueen*[1]:

"It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to

1. (1872) I.A. Supp. Vol., p. 40 at 43.

hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it."

It is clear that before the transferee can get the benefit of this section, he should establish (1) that the transferor was the ostensible owner of the property; (2) that the ostensible owner should be holding the property with the consent, express or implied, of the real owner; and (3) the transferee should have paid consideration and acted in good faith after reasonably careful enquiry. In this case we find it difficult to hold that the documentary evidence is enough to satisfy the first condition that the transferors were the ostensible owners of the entire property. The original title deeds in respect of three of the items stand also in the name of Alliyar's son Syed Ahmed and in respect of item 2 of schedule II, the only document available contains also the name of Alliyar as owner. The fact that subsequently the names of some only of the co-owners were entered in the pattas does not necessarily mean that the other co-owners have lost their title. The patta itself does not confer any title on the grantees. No doubt in the partition of 1931 the title was assumed to vest in the parties thereto.

It is not necessary to say what would have been the legal position if the only evidence available were the documents referred to above. We have, however, the positive evidence of the 19th defendant and his clerks D.Ws. 10 and 11, which must really form the basis of a decision of the question raised under section 41 of the Transfer of Property Act. One of the primary factors for consideration is the good faith of the purchaser and the care with which he made his enquiries into title. The 19th defendant admits that some of the title deeds showed purchases by Alliyar and his son. So he was put on notice of the title of Alliyar's heirs. His definite case is that he made enquiries of the plaintiff. In cross-examination he says that he did not ask the plaintiff if any heirs of Alliyar were alive and that he did not enquire if the daughters of Alliyar were married as he did not think it necessary. He says that he also made enquiries of one Saibu and one Sadayandi Aiyar neither of whom has been examined. It is significant that when the plaintiff was in the box he was not asked whether he was consulted by the 19th defendant before he made the purchase. His entire evidence and the evidence of his clerk D. W. 11 clearly leave on us the impression that the 19th defendant was well aware of the existence of the plaintiff as a person having possibly an interest in the property. We do not believe the story that the 19th defendant ever consulted the plaintiff and that the plaintiff did not put forward any claim to the properties or that he gave false information about Alliyar's heirs. It is not as if the 19th defendant's case is that he was never aware of the existence of the plaintiff and that according to his best enquiries his transferors were the only persons entitled to the properties. Nor is it his case that he was entirely guided by the documents. On the other hand his case is that he made an enquiry. We have no hesitation in holding that this enquiry was hopelessly inadequate and does not establish good faith. The 19th defendant would not therefore be entitled to the benefit of section 41 of the Transfer of Property Act and the appeal must fail in respect of these items.

Defendants 28, 29 and 32 claim under a settlement deed executed by the 35th defendant, who purchased items 3 to 6 of schedule II and item 51 of schedule III under Ex. D-15, from the two sons of Syed Ahamad on 17th July, 1935. Of these items, there is no documentary evidence whatsoever available in respect of item 5 of schedule II before 1931 when it was included in the partition Ex. P-20. On this material, we must hold that the plaintiff has not been able to establish the title of Mukkuthi to this item and his claim must therefore fail.

Item 3 of schedule II was purchased by the three brothers of Alliyar and his son Syed Ahamad on 11th May, 1912 (Ex. D-9-r). Items 4 and 6 of schedule II were purchased on the same date by the same persons under Ex. D-9 (p). Item 51 of schedule III was purchased by the same persons under two sale deeds Ex. D-9 (q) dated 13th July, 1909, and Ex. D-9 (r) dated 11th May, 1912. This last item No. 51 was entered in 1916 in the patta granted to all the said four persons but in 1917

the patta contained only the names of the three brothers, Sheik Uduman, Ghosu Mohamed and Syed Ahamad and in 1923 the patta contained the names of Sheik Uduman, Ghosu Mohamed and the two sons of Syed Ahamad and two other female sharers. All these items were included in the partition deed in 1931 and were allotted to the share of the son of Syed Ahamad.

The 29th defendant gave evidence as D. W. 12. He admitted that some of the title deeds contained also the name of Alliyar's son. According to him the only person of whom any enquiry was made was Sadayandi Aiyar, a clerk of the family but Sadayandi Aiyar has not been examined. In cross-examination he confessed that he did not enquire if Alliyar left any daughter behind him or when Alliyar's son died. On this evidence, it is impossible to hold that defendants 28, 29 and 32 have discharged the burden of proving good faith and a prudent enquiry. We are also inclined to hold that in respect of items 3, 4 and 6, it cannot be said that the transferors were the ostensible owners. No doubt in respect of item 51, the later pattas did not contain the names of Alliyar's heirs, but that circumstance alone cannot help the purchaser.

It may be mentioned that both as regards defendant 19 as well as defendant 35 under whom defendants 28, 29 and 32 claim, there is one fact not without significance and that is that they were Mahomedans and residents of the same village in which Sheik Uduman and others were living.

The result is that the appeal is allowed in respect of items 21, 22, 24 and 42 of schedule III and item 5 of schedule II and dismissed otherwise. The parties will pay and receive proportionate costs.

The learned advocate for the appellants wanted us to give a direction that the items in respect of which they have failed may be allotted to the share of their transferors in the partition to be made by Court. The learned Subordinate Judge in paragraph 62 of his judgment had already decided to leave this question for decision in final decree proceedings. In the absence of all the parties in the appeal we cannot make any further order in this matter.

B.V.V. ——— *Appeals allowed in part and decrees modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Eangoli Krishnan .. *Petitioner**

v.

Kuniyll Soopi and others .. *Respondents.*

Malabar Compensation for Tenants Improvements Act (I of 1900), section 5 (2)—Scope of—Kanom—Tenant holding over—Suit for rents due—Limitation—Limitation Act (IX of 1908), Articles 110 and 116—Article applicable.

According to section 5 (2) of the Malabar Compensation for Tenants Improvements Act although the tenancy is terminated, the tenant entitled to remain in possession till ejectment continues in possession as tenant subject to the terms of his lease.

The case of a kanom is distinct from that of an ordinary lease and a tenant holding over under the kanom tenure is not in the same position as a tenant holding over after the expiration of the ordinary lease and consequently Article 116 of the Limitation Act and not Article 110 of the Act applies to suits to recover rents due from such a tenant.

So, where a registered marupat was executed in favour of the plaintiff for 12 years which was also a kanom, because properties were given as security, and a melcharth was given and the melcharthdar assigned his right to rent for two years to the plaintiff and the plaintiff brought the suit after 12 years from the date of the marupat and after three years from the date when the rents for the two years had accrued, but within six years from that date,

Held, that Article 116 applied and that the action must be deemed to have been brought on the foot of the contract in writing registered although the period of 12 years had expired and as such was within time.

Govindan v. *D' Silva*, (1938) 1 M.L.J. 313 and *Rayarath Parkum Kurnam Kandiyil Kombilon Ammotki* v. *Kottakoolath Kunhi Sankaran Adiodi*, (1916) 2 M.W.N. 117, referred.

* C. R. P. No. 1056 of 1945. 22nd April, 1946.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Additional District Munsiff of Tellicherry in S. C. S. No. 118 of 1944.

A. Achuthan Nambiar for Petitioner.

C. K. Viswanatha Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The first defendant in S. C. S. No. 118 of 1944, on the file of the District Munsiff's Court of Tellicherry is the petitioner. On 10th November, 1932, a marupat, Ex. P-1, was executed in favour of the plaintiff by the first defendant and one Kannan. Kannan having died, defendants 2 to 5 were brought on record as his legal representatives. The instrument was for a period of 12 years. Though it was called a marupat, it was also a Kanom because properties were given as security. On 10th April, 1930, Ex. P-2, a melcharth was given of the suit and other properties, and on 8th November, 1940, under Ex. P-3, the melcharthdar, sixth defendant, assigned to the plaintiff the rents due from the lessee for the years 1938-39 and 1939-40. On the strength of the assignment, the plaintiff filed the suit, which has given rise to the revision petition, for arrears of rent in respect of these two years.

Inter alia, a plea of limitation was raised, and it was contended that Article 110 of the Limitation Act applied and that the suit having been brought after the expiry of three years after the rents for the two respective years had accrued due was barred. The learned District Munsiff held relying on the decision in *Rayarath Parkum Kurnam Kandiyil Kombilon Ammothi* v. *Kottekoolath Kunhi Sankaran Adiodi*[1] that the appropriate article applicable was Article 116 and not Article 110. In that decision, it was pointed out that the case of a kanom was distinct from that of an ordinary lease and a tenant holding over under the kanom tenure was not in the same position as a tenant holding over after the expiration of the ordinary lease, and consequently it was held that Article 116 was applicable and not Article 110. The suits covered by Article 116 are suits for compensation for the breach of a contract in writing registered. Here Ex. P-1 is a registered marupat and hence obviously that article is applicable.

The learned advocate for the petitioner contends that the period of twelve years mentioned in Ex. P-1 having expired, the suit brought by the assignee could not be held to be a suit brought for breach of the contract under Ex. P-1. This argument ignores the provisions of section 5 of the Malabar Compensation for Tenants Improvements Act (I of 1900). Under that section, where there have been improvements and a tenant is entitled to compensation for improvements, he is entitled to remain in possession until ejectment in execution of a decree or order of Court, and on ejectment, the tenant will be entitled to compensation for improvements made by him or his predecessor in interest. Under clause 2 of that section, a tenant so continuing in possession holds during such continuance as a tenant subject to the terms of his lease or of the mortgage, as the case may be. The scope of this section came up for consideration before Venkatasubba Rao and Abdur Rahman, JJ., in *Govindan* v. *D'Silva*[2] and the learned Judges pointed out :

> "This section enacts a contradiction, it says that although the tenancy is determined, the tenant continues in possession as such subject to the terms of his lease."

The contention, as was advanced before me, that his provision was not intended to override the general law was repelled in view of a number of decisions of this Court which held to the contrary, and the learned Judges observed that they did not think it right to unsettle the law on a point such as this. In these circumstances, the action must be deemed to have been brought on the foot of the contract in writing registered, although the period of twelve years mentioned in Ex. P-1 had expired. The learned advocate for the petitioner drew my attention to the decision

1. (1916) 2 M.W.N. 117.
2. (1938) 1 M.L.J. 313.

in *Seydarakath Kakkachi* v. *Muhamad Kutti*[1], but that was a case of an ordinary lease and not of a kanom.

The view upon which the lower Court has acted is therefore right. The revision petition is dismissed with costs.

V.P.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Kuppuswami Padayachi .. *Petitioner**

v.

Jagadambal .. *Respondent.*

Criminal Procedure Code (*V of* 1898), *sections* 488 *and* 489—*Resumption of co-habitation after an order for maintenance—Effect—Subsequent neglect or refusal to maintain wife—Remedy of wife—Cancellation, when justified.*

When once after the passing of an order for maintenance under section 488, Criminal Procedure Code, the husband and wife have resumed co-habitation, the order becomes automatically ineffective and unenforceable. No formal cancellation of that order appears to be necessary. If there is neglect or refusal on the part of the husband to maintain the wife subsequently, that would furnish a ground for the wife to make a fresh application, but she would not be entitled to claim the payment of maintenance on the strength of the order passed before the resumption of co-habitation.

Venkayya v. *Raghavamma*, (1941) 2 M.L.J. 263 : I.L.R. 1942 Mad. 24, followed.

After the passing of an order for maintenance there was a resumption of joint living and co-habitation. Subsequently the wife left her husband and claimed the maintenance awarded to be continued and the husband in his turn applied for cancellation of the order for maintenance under section 489, Criminal Procedure Code, which was dismissed. In revision,

Held, that in the circumstances the order for maintenance should have been cancelled.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate, Ariyalur, dated 28th January, 1946, in M. C. No. 49 of 1945.

N. Suryanarayana for Petitioner.

G. Gopalaswami and *S. Venkatachalam* for Respondent.

The Court made the following

ORDER.—This is an application to revise an order made by the Sub-Divisional Magistrate of Ariyalur dismissing an application under section 489 of the Code of Criminal Procedure filed by the petitioner for cancellation of an order of maintenance that had been passed in M. C. No. 40 of 1944. In M. C. No. 40 of 1944, the petitioner was directed to pay maintenance to his wife, who was the petitioner in that petition and who is the respondent here. A revision application was filed against that order and when that application came up for hearing in this Court on 5th February, 1945, it was represented by the petitioner that the case had been compromised. The respondent's advocate then mentioned to the Court that he had not heard about it and he took time to verify the information. On 7th February, 1945, it was reported by both parties that the husband and wife had resumed co-habitation and on that ground the petition was not pressed and was eventually dismissed. No specific orders were however then passed regarding the order of maintenance which had been passed in M. C. No. 40 of 1944. It would appear that as reported then to this Court the respondent rejoined the petitioner and lived together, according to the petitioner, for six months. Subsequently, however on account of differences that arose again, the respondent left the petitioner's house and claimed the maintenance awarded in M. C. No. 40 of 1944 to be continued. That occasioned the filing of the application under section 489 of the Code of Criminal Procedure by the petitioner, for the cancellation of the maintenance order. The

1. (1910) 6 I.C. 754.

* Cr. R. C. No. 147 of 1946. (Cr. R. P. No. 141 of 1946). 9th September, 1946.

learned Magistrate dismissed that petition on grounds which appear to me to be wholly untenable.

It is unnecessary to canvass those grounds as the matter is covered by direct authority. It was held by the learned Chief Justice and Mockett, J., in *Venkayya* v. *Raghavamma*[1] that a decree obt ined by a Hindu wife against her husband for maintenance becomes annulled by reason of subsequent resumption of co-habitation and is not merely suspended during such period of resumption. The learned Chief Justice in his judgment reviewed the Indian as well as the English precedents on the question of alimony and held that by returning to her husband the wife became disentitled to claim maintenance against him and the decree which she had obtained must be regarded in the circumstances as having become ineffective. It was observed that by going back to her husband the wife restored the position to what it was when they were married. In dealing with the repercussion of this principle on the provisions of the Indian Criminal Procedure Code the learned Chief Justice stated that he could see no difference in principle between an order passed under section 488 of that Code and an order under the Matrimonial Causes Act, 1878, or the English Summary Jurisdiction (Married Women) Act, 1895. He pointed out that if the principle stated by Lord Elden in *Bateman* v. *Ross*[2] was to be applied, there can be no question of the suspension of the order; the order goes entir ly. Mockett, J., in concurring with this view pointed out that the view taken by Curgenven, J., in *Kanagammal* v. *Pandara Nadar*[3] was not in conformity with the well-settled principles. The learned Chief Justice also referred to this decision of Curgenven, J., and said that the decision ran directly counter to the principle embodied in the judgment in *Haddon* v. *Haddon*[4]. The position thus is that when once after the passing of an order of maintenance under section 488, the husband and wife have resumed co-habitation, the order becomes automatically ineffective and unenforceable. No formal cancellation of that order appears to be necessary. If therefore there was neglect or refusal on the part of the husband subsequently, that would furnish a ground for the wife to make a fresh application, but she would not be entitled to claim the payment of maintenance on the strength of the order passed before the resumption of co-habitation. This principle was followed in and applied to a criminal case under section 488 by Kuppuswami Aiyar, J., in *Munuswami Pillai* v. *Doraikannu Ammal*[5]. There the learned Judge emphasised that the joint living should have been resumed as husband and wife. The facts of that case were peculiar. The husband in that case brought the wife by a ruse into his house only to get over the order of maintenance that had been passed against him and never lived with her thereafter, but lived in a separate house with his concubine. The wife was attended to, if at all, by the husband's mother and she was made to do some menial work in the house. In those circumstances the learned Judge was of the opinion that such conduct did not amount to resumption of joint living and co-habitation. The facts of the present case are entirely different and there is evidence that for a period of six months the petitioner and the respondent lived as husband and wife after the order of dismissal was passed by this Court in Crl. R. C. No. 874 of 1944. Following the Bench decision I must hold that the maintenance order passed in M. C. No. 40 of 1944 ceased to be effective automatically on the resumption of co-habitation between the petitioner and the respondent and that the learned Magistrate ought in those circumstances to have cancelled the order when an application was made under section 489 seeing that an attempt was being made by the respondent to enforce the order.

In the result, the petition is allowed and the application made by the petitioner under section 489 is granted and the order of maintenance passed in M. C. No. 40 of 1944 against him in favour of the respondent is cancelled.

V.S. ——— *Petition allowed.*

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1. (1941) 2 M.L.J. 263 : I.L.R. 1942 Mad. 24.
2. (1813) 1 Dow. 235 : 3 E.R. 684.
3. (1926) 52 M.L.J. 176 : I.L.R. 50 Mad. 663.
4. (1887) 18 Q.B.D. 778.
5. (1945) 2 M.L.J. 408.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

M. Muniswami Goundar .. *Petitioner.**

Madras Food Grains Control Order (1942), clause 3—Licence in the name of the manager of a joint Hindu family—Another member helping in the trade as member of the family—No separate licence in his name—Prosecution for violation of clause 3 of the Food Grains Control Order—If justified.

Where the manager of the family has obtained the necessary licence under clause 3 of the Madras Food Grains Control Order and a member of the family helps him in the trade as a member of the family, the latter cannot be said to be engaging himself in the undertaking and as such a prosecution of that member under clause 3 of the order for not having obtained a separate licence in his own name would not be justified.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of North Arcot division at Vellore dated 3rd October, 1945, in C. A. No. 120 of 1945 (C. C. No. 28 of 1945, Additional First Class Magistrate, Vellore).

P. M. Srinivasa Aiyangar and *P. V. Srinivasachari* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The petitioner is the second accused in C. C. No. 28 of 1945 on the file of the Court of the Additional First Class Magistrate, Vellore. He was tried along with another who was the first accused. They were both members of a joint Hindu family, being cousins, and they were engaged in rice trade. The prosecution case was that they traded without a licence and therefore violated clause 3 of the Food Grains Control Order, 1942, and sold rice in excess of 20 maunds in a single transaction. Their defence was that they were members of a joint Hindu family and the second accused was only helping in the trade and that they did not commit any offence. The first Court found both the accused guilty on the ground that the licence was issued only in the name of the first accused and not in the name of both. On appeal the learned Sessions Judge of North Arcot acquitted the first accused because there was a licence in his name and ordered a re-trial as against the second accused. But it must be remembered that this is a case in which the second accused was not trading himself. If he had traded in his own name and on his own behalf then he would be bound to take a licence. If he had been the manager of the joint family and if as such manager he had to conduct the business on behalf of the family, then he would have taken the licence in his name for doing such business. In this case the first accused has taken a licence. The second accused even in his plea had stated that he was only helping the joint family as a member of the joint family. Consequently, it cannot be said that he was carrying on any business to necessitate his taking out a license. Clause 3 runs thus:

"No person shall engage in any undertaking which involves the purchase, etc., or storage for sale, in wholesale quantities of any foodgrain except under and in accordance with a licence issued in that behalf by an officer authorised by the Government."

This is not a case of the second accused engaging himself in any such undertaking. He was only helping the family which was engaged in such an undertaking and the family has obtained the licence in the name of the first accused who was engaged in the business on behalf of the family. In these circumstances the learned Sessions Judge was not justified in ordering a re-trial against the second accused. The order of the Sessions Judge directing a re-trial is set aside and the second accused is acquitted.

V. S. — *Petition allowed.*

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* Cr. R. C. No. 1000 of 1945. (Cr. R. P. No. 934 of 1945). 18th April, 1946.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE SHAHABUDDIN.

C. S. Ponnusami Mudaliar .. *Appellant**

v.

Subbaraya Mudaliar and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 90—Insolvent, if a person interested—Application by insolvent to set aside sale—Maintainability—Amendment of Order 21, rule 22, if affects the question.

An insolvent is a person interested within the ordinary meaning of that expression and an application by him under Order 21, rule 90, is maintainable. The decisions based on insolvency law in which it has been held that the insolvent was not a person aggrieved have no application to petitions under Order 21, rule 90, of the Code. The amendment of rule 22 of Order 21 does not affect the question whether the insolvent was a person interested within the meaning of Order 21, rule 90.

Appeal against the order of the Court of the Subordinate Judge, Cuddalore, dated 19th March, 1945, in M. P. No. 650 of 1944, in E. P. No. 128 of 1942, in O. S. No. 11 of 1930.

S. Panchapakesa Sastri and *K. R. Krishnaswami Aiyar* for Appellant.

R. Gopalaswami Aiyangar for Respondents.

The Judgment of the Court was delivered by

Horwill, J.—This is an appeal against the order of the Subordinate Judge of Cuddalore dated the 19th March, 1945, dismissing an application by the appellant to set aisde a sale of lot No. 3 in a sale held on the 26th October, 1943.

The principal ground on which the sale was sought to be set aside was that a number of houses had been clubbed together as lot No. 3 and were sold together instead of separately, in which case the sum of the prices realised on individual sales would have been more than the amount realised by a sale of the houses clubbed together. The learned Subordinate Judge devoted a great part of his judgment to a consideration of the question whether an application by the appellant was maintainable, in view of the circumstance that he had been declared an insolvent, and he came to the conclusion that the application was not maintainable. Fortunately however, he also considered the application on its merits, and held that on that ground also no sufficient reason had been shown for setting aside the sale.

The learned Subordinate Judge primarily relied on *Hari Rao* v. *Official Assignee, Madras*[1], in which on a question of insolvency law it was held that an insolvent had a mere *spes successionis* in the property in the hands of the Official Receiver and that he was not therefore a person aggrieved. Although the learned Subordinate Judge apparently read *Manthiri Goundan* v. *Arunachalam*[2], in which it was held that the decision in *Hari Rao* v. *Official Assignee, Madras*[1], had no application to petitions filed under Order 21, rule 90, of the Civil Procedure Code, yet he rather surprisingly expressed the opinicn that *Manthiri Goundan* v. *Arunachalam*[2] was no longer good law ; because since that decision Order 21, rule 22, had been amended so as to make it incumbent on the Court in the case of applications for execution to issue notice to the Official Receiver instead of to the insolvent. The amendment of rule 22 of Order 21 cannot however affect the question whether the insolvent was a person interested within the meaning of Order 21, rule 90 ; and since it was held in *Manthiri Goundan* v. *Arunachalam*[2], that an insolvent was a person interested within the ordinary meaning of that expression and that the decisions based on insolvency law in which it was held that the insolvent was not a person aggrieved had no application to petitions under Order 21, rule 90, it would follow that the learned Subordinate Judge was wrong on this point. It is unnecessary to say anything more on this point ; because the learned advocate for the respon-

* A. A. O. No. 238 of 1945. 27th March, 1946.

1. (1926) 50 M.L.J. 359. 2. (1940) 1 M.L.J. 711.

dents at once conceded that he cannot support the judgment of the Subordinate Judge on that ground.

As to the merits of the appellant's application, we are in entire agreement with the learned Subordinate Judge. The appellant's own evidence as P.W. 1 shows that he was quite aware of the execution proceedings, although notice was not sent to him. His three sons who had not been adjudicated insolvents received notice; and his evidence shows that he knew of the sale proceedings and had applied through them for an adjournment of the sale. Neither directly nor indirectly through his sons did he approach the Court and suggest that the houses should be sold in separate lots. The reason why all the houses were sold in one lot was that the decree-holder was of opinion that they were all the subject of one mortgage. That belief proved to be erroneous; but there was no lack of good faith on the part of the decree-holder. He had obtained an encumbrance certificate, which showed that all these houses were the subject of one mortgage. If that were so, then it was obviously convenient and proper to sell the houses together in one lot; for it is unlikely that any one would have purchased any individual house if a number of other houses were with it subject to one mortgage.

The appellant alleged that the houses sold were worth Rs. 28,000; so that after deducting the mortgage amount of Rs. 7,500 they should have fetched Rs. 20,500, as against Rs. 8,825 actually realised. The appellant examined three witnesses, P. Ws. 2 to 4, to suggest that he was prejudiced by the clubbing together of these houses for sale and that if sold separately, higher prices would have been realised; but the evidence of P. Ws. 2 to 4 does not convince us that that would have been the case. The object of selling the houses separately was that individuals who could not afford or did not wish to purchase the whole of the property might have given good prices for the individual houses. P.W. 2 was not however a man of such limited means and desires. He deposed even in his examination in chief that he was prepared to purchase the encumbered house for Rs. 10,000 and houses Nos. 1, 2, 3 and 3-A for Rs 8,000. Assuming that he meant by this that he would have been prepared to have given Rs. 18,000 if the houses had been free from any encumbrance, this evidence would show that he would have been prepared to have given Rs. 10,500 for the unencumbered house No. 3-B and the encumbered houses Nos. 1, 2, 3 and 3-A; yet he stated that even in examination-in-chief that he stopped bidding at Rs. 8,000, because the mortgage amounted to Rs. 7,500. One would have expected him on this evidence to have bid up to Rs. 10,500 at least, even though he did not want the remaining house No. 8, which he valued at Rs. 6,000. His evidence cannot therefore be accepted at its face value. The evidence of P.Ws. 3 and 4 shows that they were not very much interested in these houses and did not trouble to make any inquiries. P.W. 4 admitted that he did not even see the proclamation. We therefore agree with the learned Subordinate Judge that there was no fraud or material irregularity; nor are we satisfied that the price fetched was less than what it would have been had the houses been sold separately.

The appeal is dismissed with costs of the first respondent.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR SIDNEY WADSWORTH, *Officiating Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

The Commissioner of Income-tax, Madras .. *Applicant**

v.

S. Ramsay Unger, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 10 (1) and (2) (iii)—Existing business—Assessee becoming partner—Provision for assessee becoming sole proprietor—Amounts remaining in firm to credit of others—Interest paid—Whether can be treated as interest paid on borrowed capital—Will—Construction—Direction for distribution of residue only after death of two legatees—No further words of gift of the residue—Sharers of the residuary estate, if take vested interests immediately on the testator's death.

The assessee joined his father's pre-existing business as a partner in 1916. The articles of partnership entered into between the parties in 1921 provided, *inter alia*, that the assessee should become

* Case Referred No. 28 of 1945. 8th November, 1946.

the sole proprietor of the business at the end of the year 1935 or on the death of his father if it happened earlier, and that the large amount of capital standing to the credit of the father in the books of the firm should continue in the firm for twenty years after the termination of the partnership or for such shorter or longer period as the assessee might require, bearing interest at 6 per cent. per annum. The father died in 1929 leaving him surviving his widow, four sons including the assessee and a daughter. Before his death the father executed a will and a codicil whereby after providing for certain specific legacies he apportioned the residuary estate among his heirs and directed the executors to close the accounts and divide the balance or residue only "after the death (and not till then) of" *E* and *M*, two of the legatees mentioned in the will. After the death of the testator the assessee acquired the entire residue of his father's estate subject to the specific legacies. The assessee maintained separate accounts for the estate as executor and duly credited therein the interests received from his firm. The question was raised whether the interest debited in the books of the firm to the estate of the deceased could be said, apart from the sum payable in respect of the pecuniary legacies, to have been "paid" on capital "borrowed" within the meaning of Section 10 (2) (iii) of the Income tax-Act.

Held, that inasmuch as the testator had authorised his executors to keep in the firm the moneys belonging to the estate, the amount credited to the estate in the books of the company should be regarded as borrowed capital and that the whole of the interest debited should be allowed as interest paid on such capital.

Where after providing for certain specific pecuniary legacies payable by instalments spread over a number of years, the executors were directed to close the accounts and divide the balance or residue only "after the death (and not till then) of" *E* and *M*, two of the legatees mentioned in the will, on a question as to whether the sharers of the residuary estate took vested interests immediately on the testator's death,

Held, that as there were no words of gift apart from the direction to distribute, the testator must be taken to have intended that not only the distribution but also the vesting of the residuary shares should be postponed.

Jarman on Wills, VII Edition, Vol. II, pages 1373 and 1376, followed.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in 66 R. A. 52 Madras of 1944-45 on its file.

C. S. Rama Rao Sahib for Applicant.

B. Sitarama Rao for *Messrs. Short Bewes and Co.* for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This is a reference by the Income-tax Appellate Tribunal, Madras, under section 66 (1) of the Indian Income-tax, 1922.

One Mr. S. Ramsay Unger (hereinafter called the assessee) was assessed to income-tax for the year 1942-43 on a total income of Rs. 70,766 in which was included a sum of Rs. 46,061 as income derived from the business of ice manufacture and cold storage carried on by him under the name of "Ramsay & Co." He claimed before the Income-tax authorities a deduction of a sum of Rs. 22,108 as being interest paid to the estate of his father, the late John Ramsay Unger, on capital said to have been borrowed from the estate for the purposes of his business. The claim was disallowed except to the extent of only Rs. 1,984 on the ground that, in the circumstances hereinafter mentioned, the assessee had become the sole owner of the residuary estate subject to certain pecuniary legacies payable under his father's will and that, therefore, except in regard to the aforesaid sum of Rs. 1,984 representing the interest payable to such legatees, the deduction claimed was in truth in respect of a payment to himself. The assessee appealed to the Income-tax Appellate Tribunal who considered that the administration of the testator's estate had not been completed and the residue ascertained and that it was still in the hands of the assessee in his capacity as executor and had not become his property. The Tribunal accordingly allowed the appeal and directed the exclusion of the balance of Rs. 20,124 also from the assessment. Thereupon the Commissioner of Income-tax, Madras, applied to the Tribunal to state the case and refer it to this Court, claiming that a question of law arose out of its order, and the Tribunal, agreeing that a point of law was involved referred to this Court for its decision the following question :

"Whether on the facts and in the circumstances of the case, the sum of Rs. 20,124 was allowable as a deduction as interest on borrowed capital within the meaning of section 10 (2) (iii) of the Act."

"Ramsay & Co." was founded by the late John Ramsay Unger and the assessee joined the business as a partner in 1916. Under the articles of partnership entered into between the parties on the 25th February, 1921, it was provided, *inter alia*, that the assessee should become the sole proprietor of the business at the end of the year 1935 or on the death of his father if it happened earlier, and that the large amount of capital standing to the credit of the father in the books of the firm should continue in the firm for 20 years after the termination of the partnership or for such shorter or longer period as the assessee might require, bearing interest at six per cent. per annum. John Ramsay Unger died in July 1929, leaving him surviving his widow, four sons including the assessee and one daughter. He made a will on the 13th May, 1926, which was later supplemented by a codicil dated the 6th November, 1928. By the said will he " confirmed and ratified " the provisions of the partnership agreement of the 25th February, 1921, declared that his estate consisted of a sum of Rs. 3,22,111-14-4 standing to his credit in the books of Ramsay & Co., on the 31st December, 1925, and certain lands and buildings more particularly described in the will and appointed his sons Sherrard Ramsay Unger (the assessee) and Oscar Ramsay Unger as executors. He then proceeded to bequeath certain pecuniary legacies to his wife and others which he directed his executors to pay in instalments as follows :

"No. I. Rs. 48,000 (forty-eight thousand rupees) with annual interest at the rate of 6 per centum accruing thereon to my wife Emile Unger by monthly instalments of Rs. 400 (four hundred rupees) on the 1st day of each month after my decease.

No. II. Rs. 36,000 (thirty-six thousand rupees) with annual interest at the rate of 6 per centum accruing thereon to Mary (May) Elizabeth Unger (widow of my brother William Alender Unger) as a token of my appreciation of her unfailing care of me for many years by monthly instalments of Rs. 300 (three hundred rupees) on the 1st day of each month after my decease.

No. III. Rs. 15,000 (fifteen thousand rupees) with annual interest at the rate of 6 per centum accruing thereon to my son, Cyril Ramsay Unger by monthly instalments of Rs. 125 (one hundred and twenty-five) rupees on the 1st day of each month after my decease.

No. IV. Rs. 15,000 (fifteen thousand rupees) with annual interest at the rate of six per centum accruing thereon to my son, Kennard Ramsay Unger by monthly instalments of Rs. 125 (one hundred and twenty-five rupees) on the 1st day of each month after my decease."

Then follow the provisions regarding the disposal of his residuary estate, on the interpretation and effect of which the present controversy largely turns. They are as follows :

" After the death (*and not till then*) of the aforementioned Emile Unger and Mary (May) Elizabeth Unger (legatees numbers I and II) I direct my executors to close the accounts of my estate and after setting apart sufficient money or fund or property to disburse and discharge completely the aforementioned legacies numbered I to IV, to divide the balance or residue of my estate into three equal shares to be distributed as follows

Residuary Estate.

One share of the residue to be paid or given to my son, Oscar Ramsay Unger (Captain, Indian Medical Service) or his heirs ;

One share to be paid or given to my daughter, Tessa Ramsay Bartley (wife of W. K. Bartley) or to her heirs ; one share to be paid or given to my son, Sherrard Ramsay Unger or to his heirs.

I direct these three residuary shares to be paid by my executors by annual instalments which shall be not less than one-twentieth in any event but such instalments may be more than one-twentieth in every or any year according as it suits the convenience of the said Sherrard Ramsay Unger.

I specially direct payment of all these legacies and residuary shares by instalments spread over a series of years in order that the withdrawal of moneys may not in any way incommode the House of Ramsay & Co."

The codicil which was executed " with a view to avoid any controversy or contention " and " as a measure of abundant caution " does not materially affect the dispositions under the will, and it is unnecessary to refer to its terms in detail.

There is no dispute that all debts, funeral and testamentary expenses were paid, and the real properties were sold and the proceeds added to the fund credited to the estate in the books of Ramsay & Co., as directed in the will, long before the year of account, 1941-42. On the 30th March, 1931, the assessee obtained by

transfer from his sister Tessa Ramsay Bartley "all her past, present and future interests under the said will and codicil including her right, title, interest, claim and demand to and in her share of the residuary estate" in consideration of a sum of Rs. 40,000 paid to her. Similarly, he obtained under another instrument of transfer dated the 26th June, 1931, the right, title and interest "past, present and future" of Oscar Ramsay Unger in his share of the residuary estate on payment to him of Rs. 50,000. The assessee has thus purported to acquire the entire residue of his father's estate subject to the four pecuniary legacies payable under the will. As, however, some instalments of these legacies still remained to be paid and the executors were directed under the will "to close the accounts of my estate" and to distribute the residue "after the deaths and not till then" of the legatees numbered I and II who are alive, the assessee has been maintaining separate accounts for the estate as executor duly crediting therein the interests received from Ramsay & Co., and debiting the instalments of legacies paid from time to time. The Appellate Tribunal has found that the assessee has been doing so *bona fide* in accordance with the directions contained in the will and not as a device for avoiding due assessment to tax, and that finding has not been questioned before us. It may be mentioned here that till the year 1942-43 when the assessment now in question came to be made, the assessee had all along been maintaining his accounts on the same basis, claiming deduction every year of the interest debited to the estate in the assessment of his personal income and returning such interest for assessment as income received by him as executor of his father's estate, and the Income-tax authorities had been making assessments accordingly.

The relevant provisions of the Indian Income-tax Act, 1922, are as follows:

"Section 10 (1): The tax shall be payable by an assessee under the head 'Profits and gains of business, profession or vocation' in respect of the profits or gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely:

*   *   *   *   *

(iii) in respect of capital borrowed for the purposes of the business, profession or vocation, * * * * the amount of the interest paid."

The question is whether, on the facts stated above, the interest debited in the books of Ramsay & Co., to the estate of the late John Ramsay Unger could be said, apart from the sum of Rs. 1,984 payable in respect of the few remaining instalments of the four pecuniary legacies, to have been "paid" on capital "borrowed." Obviously not, if the residue of such estate had, before the year of account, become the property of the assessee, for, there could be no borrowing from or payment to himself. Mr. Rama Rao Sahib for the Commissioner of Income-tax submitted that that was the true position, and that the maintenance of separate accounts for the "estate" and the crediting of the interest therein should not be allowed to obscure the realities of the situation. He drew attention to illustration (ii) to section 333 (2) of the Indian Succession Act, 1925, and urged that the assessee, having commenced to pay the instalments of the legacies, must be deemed to have assented to the whole of the legacies with the result that the legatees' title to their respective legacies was perfected and thereafter the assessee held the moneys payable to them merely as trustee or debtor and not as executor. As the entire estate of the testator at the relevant period consisted only of moneys invested in the assessee's business, and the necessary funds to meet the legacies could easily be calculated and set apart, the residue, it was said, must be taken to have been ascertained and appropriated by the assessee who had acquired by transfer the right, title and interest of the other sharers, all testamentary expenses having admittedly been paid long ago. The argument proceeded, as did the reasoning of the Appellate Tribunal to the contrary, on the assumption that the sharers of the residuary estate took vested interests immediately on the testator's death, distribution alone being postponed. Mr. Sitarama Rao for the assessee, however, contended before us (although the contention might, in certain events, imperil the transfers obtained by the assesee) that, on a true construction of the provisions relating to the residue, the gifts were contingent on the person first named in each case being alive

at the period of distribution, that is, at the death of the survivor of Emile Unger and Mary (May) Elizabeth Unger. As these two persons are still alive, there could be no question as to the residue having become the property of the assessee. We are of opinion that this contention must prevail.

It is to be noted that there are no words of gift of the residue in the will apart from the direction for its distribution after the deaths of the two persons aforementioned. The rule of construction applicable in such cases is thus stated in Jarman on Wills:

"A leading distinction is that if futurity is annexed to the substance of the gift the vesting is suspended; but if it appears to relate to the time of payment only the legacy vests *instanter* (VII edition, Vol. II, page 1373). . . . . . It should seem too, that, where the only gift is in the direction to pay or distribute at a future age, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift." (Page 1376.)

And the learned author cites, among others, Re *Eve Belton* v. *Thompson*[1] as illustrating the rule. There a testator directed his trustees to pay a legacy of £1,000 "six years after my decease." The legatee died within 3 years after the testator's death. Kekewich, J., held that, there being no gift except in the direction to pay, everything depended upon the expiration of six years, and that, the legatee not having survived this period after the testator's death, his estate did not take the £1,000. In the present case, as will be seen from the provisions quoted above, the executors are directed to distribute the residue "after the deaths (and not till then)" of Emile Unger and Mary (May) Elizabeth Unger. As there are no words of gift apart from this direction to distribute, the testator must, according to the rule cited above, be taken to have intended that not only the distribution but also the vesting of the residuary shares should be postponed.

Mr. Rama Rao Sahib referred us to *Browns* v. *Moody*[2] as showing that their Lordships of the Judicial Committee did not favour the distinction pointed out by Mr. Jarman. We do not understand the decision in that sense. No doubt, their Lordships reversed the decision of the Supreme Court of Canada which held, following the rule referred to by Mr. Jarman, that certain legatees of a fund which was directed to be distributed among them after the death of the testator's son who was given the income of the fund during his life, did not take a vested interest on the death of the testator. But their Lordships said nothing to throw doubt upon the rule. They only recognised and gave effect to a limitation on the application of the rule which Mr. Jarman himself has stated in his book:

"Even though there be no other gift than in the direction to pay or distribute in future, yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question." (Volume II, page 1377.)

As, in the case before their Lordships, there was, in effect, a life interest in the fund given to the son so that the fund could not be divided or paid over until his death, that is to say, the distribution was postponed "for the convenience of the fund", their Lordships held that the legacies became vested on the death of the testator. They observed,

"The distinction between a present gift coupled with a postponement of the date of payment and a direction to pay at a future date without any words of present gift, is no doubt an important distinction, and is, in certain circumstances, an element in determining whether vesting a *morte testatoris* has or has not taken place, as where conditions of survivorship and the like are adjected to the direction to pay. But where there is a direction to pay the income of a fund to one person during his lifetime and to divide the capital among certain other named and ascertained persons on his death, even although there are no direct words of gift either of the life interest or of the capital, the rule is that vesting of the capital takes place a *morte testatoris* in the remaindermen."

No life interest is interposed in the present case. The persons after whose deaths the residue is to be distributed might die before or after all the instalments of their pecuniary legacies are paid and it cannot, therefore, be said that the distribution has been deferred for the convenience of the fund. The case thus calls for the application of the rule and not of the exception stated by Mr. Jarman.

1. 93 L. T. 235. 2. (1936) A.C. 635.

The contingent character of the gifts is emphasised by the bequest in the alternative to the "heirs" of the first named legatee in each case. Ordinarily, an alternative gift is intended to take effect only in the contingency of the first named legatee dying in the testator's lifetime, but, if such legatee survives the testator, he acquires a vested and indefeasible interest and the alternative gift does not take effect. But, as pointed out by Mr. Jarman (Volume II, page 1288) citing *Girdlestone* v. *Doe*[1] and other cases, where the words of substitution are applied to a bequest which may not take effect in possession at the testator's death (as in the present case), the first named legatee, though he survives the testator, does not take a vested and indefeasible interest unless he survives also the period of distribution. The vesting is in suspense and if he dies in the interval, the bequest to him lapses and "his heirs" will take as the alternative legatees. This rule is embodied in section 96 of the Indian Succession Act, 1925, illustration (vi) which seems to be based on *Girdlestone* v. *Doe*[1].

It follows that the gifts of the residue are contingent on the first named legatee in each case surviving Emile Unger and Mary (May) Elizabeth Unger. As both of them are alive, the residue cannot be said to have become vested in the primary legatees named in the will, but remains still as the testator's estate in the hands of the assessee as executor. The testator having authorised his executors to "keep in Messrs. Ramsay & Co. the moneys belonging to my estate," the amount credited to the estate in the books of the company must be regarded as borrowed capital and the whole of the interest debited must be allowed as interest paid on such capital.

We answer the question referred, accordingly, in the affirmative. The assessee will have his costs which we fix at Rs. 250.

B.V.V. ——— *Reference answered in favour of assessee.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)[2]

PRESENT :—LORD SIMONDS, LORD DU PARCQ, MR. M. R. JAYAKAR, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

S. S. Sv. Kasiviswanathan Chettiar, since deceased, now represented by Lakshmi Achi .. *Appellant**

v.

S. S. S. Sv. Somasundaram Chettiar and others .. *Respondents.*

Hindu Law—Adoption—Custom among Nattukottai Chettis of adoption to a person after his death and after the death of his widow by his father or other pangalis—Pleading and proof of—Validity.

In a suit for partition and recovery of a half share of the properties in the possession of the contesting defendant, the plaintiff claimed the properties as the duly adopted son of the elder brother of the defendant according to the special custom prevailing amongst the Nattukottai Chetti community to which the parties belonged according to which it was claimed that an adoption could be validly made to a person after his death, and even after the death of his widow, by the father or other *pangalis* of the adoptive father.

On the questions whether the custom set up had been sufficiently defined and set out in the pleadings and whether the evidence adduced was sufficient to prove it,

Held, the question arose in the course of a suit for partition and not for a declaration and establishment of a special custom *as such*, and the plaintiff was expected to state succinctly no more than what was necessary to justify his claim for a share of the properties and this he had done by saying that after the death of the elder brother of the defendant he was adopted to him as his son by the adoptive grandfather according to the custom prevailing amongst Nattukottai Chettis. It cannot be said that the custom set up has not been sufficiently defined in the pleadings.

Though the evidence adduced to prove the custom was meagre, the making of an adoption after the death of the adoptive parents, which is the essential feature of the custom set up, was common to all the instances of which two were particularly illustrative of the plaintiff's case. As there was no evidence to show that such adoptions were looked upon with any disfavour by the community and as it could not be said that the religious element was absent, the concurrent finding of the Courts in India that the custom has been proved cannot be set aside.

1. (1828) 2 Sim. 225 : 57 E.R. 773.

2. (1943) 1 M.L.J. 195.

* P.C. Appeal No. 53 of 1944. 7th November, 1946.

In view of the scanty nature of the evidence and the limited number of instances of a comparatively recent date in support of the custom, this decision would bind only the parties to the suit and those claiming through them.

Judgment of the High Court[1], affirmed.

P. V. Subba Row and *Ralph Parikh* for Appellant.

S. P. Khambatta and *H. J. Umrigar* for Respondents.

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR.—This is an appeal from a decree of the High Court of Judicature at Madras[1] dated 10th December, 1942, which affirmed with a slight modification the decree of the Subordinate Judge of Sivaganga dated 21st November, 1940, in O. S. No. 11 of 1939.

The appeal arises out of a suit instituted by the plaintiff (the first respondent) for partition and recovery of a half share of the properties in the possession of the first defendant, the appellant before the Board, now dead, who is represented by Lakshmi Achi. The first defendant was the contesting defendant and will be referred to hereafter as "the defendant."

The plaintiff claimed the properties as the duly adopted son of the elder brother of the defendant. At the time of the adoption the adoptive parents of the plaintiff, that is, the elder brother of the defendant and his wife, were dead, and the adoption was brought about by the adoptive grandfather. It appears that it was done with the consent of the defendant also. Under the ordinary Hindu Law which governs the parties such an adoption would be invalid, as the only person who can make an adoption is the adoptive father, if he is alive, and after his death, his widow. But it is claimed that according to the special custom prevailing amongst the Nattukottai Chetti community to which the parties belong, an adoption can be validly made to a person after his death, and even after the death of his widow, by the father or other *pangalis* (agnates) of the adoptive father. It was pleaded in paragraph 3 of the plaint that:

"...... after the death of the first defendant's elder brother, the first defendant's father had the plaintiff adopted on the .... 20th April, 1923, in due form according to the caste custom prevalent amongst the Nattukottai Chettis for a long time. The first defendant accepted the adoption, had the adoption (ceremony) performed along with his father and he has himself written the said adoption deed ......"

The defendant denied that there was a special custom and stated that even if the custom alleged should be proved it is not valid under the Hindu law as the adoption was made after the death of both the adoptive father and mother and should not be given effect to. Some other defects comparatively of a minor nature were also mentioned by him, but these have not been pressed before their Lordships.

The question for the Board to decide is whether the custom set up by the plaintiff has been made out by the evidence.

After full consideration of the evidence the Subordinate Judge found in favour of the custom, and his finding has been upheld by the learned Judges of the High Court

It was argued before the Board that the custom set up by the plaintiff has not been sufficiently defined and set out in his pleadings; but it should be noticed that the question arose in the course of a suit for partition and not for declaration and establishment of a special custom *as such*, and the plaintiff was expected to state succinctly no more than what was necessary to justify his claim for a share of the properties, and this he has done in paragraph 3 of the plaint by saying that after the death of the elder brother of the defendant he was adopted to him as his son by the adoptive grandfather according to the custom prevailing amongst the Nattukottai Chettis. It is clear from paragraphs 3 and 4 of the written statement that the defendant well understood in reference to the facts of the case why the adoption should be held invalid according

1. (1943) 1 M.L.J. 195.

to the strict rules of the Hindu law. Issues 3 and 4 raised in the case relate to the existence and binding nature of the custom and a perusal of the evidence shows that both the parties adduced whatever evidence they had with reference to those issues. In the circumstances, it appears to their Lordships that there is no substance in the argument that the custom set up has not been sufficiently defined in the pleadings and that the defendant has been prejudiced thereby.

The real question for decision is whether the evidence that has been adduced is sufficient to prove the custom. It may be stated at once that the evidence is meagre consisting as it does, as noticed by the learned judges of the High Court, "of 4 witnesses and 9 instances, two of which alone can be said to relate to old adoptions." It may be added that the defendant's 4th witness gave two more instances. The learned counsel for the appellant points out that out of these 11 instances only two are of adoptions made by an adoptive grandfather to his deceased son—the case set up in the plaint—that they are not ancient, and that the others are instances of adoptions made by persons other than the grandfather and cannot form evidence in support of the custom pleaded by the plaintiff. It should be noticed in this connection that the making of an adoption after the death of the adoptive parents, which is the essential feature of the custom set up by the plaintiff, is common to all instances, though the instances of adoption by the grandfather are limited to only two. These no doubt are not ancient, but the evidence shows that adoptions after the death of the adoptive parents have been made by the father or the other *pangalis* of the deceased adoptive father. These other instances, together with the two instances, particularly illustrative of the plaintiff's case, form evidence of the custom regarded as a whole, *i.e.*, adoption when the adoptive parents are dead by the adoptive grandfather or other *pangalis*, and would thus support the case set up in the plaint. In this case it is of great significance that there is ample evidence to show that the appellant himself and the other relations of the parties have acted on the footing that the plaintiff's adoption is valid. No evidence has been called to show that such adoptions are looked upon with any disfavour by the community; nor can it be said, however secular the motives for adoption may be, that the religious element is absent, as the adoptions are also intended to secure the performance of various religious rites.

Considering the evidence as a whole, their Lordships are not prepared to set aside the concurrent finding of the Courts in India that the custom of adoption set up by the plaintiff has been proved. However, having regard to the scanty nature of the evidence and the limited number of instances of a comparatively recent date in support of the custom, their Lordships would add, following the precedent established by the decision of the Board in *Chiman* v. *Hari Chand*[1] that this decision would bind only the parties to the suit and those claiming through them, and that it should not be considered a satisfactory precedent if in any future instances among other members of the community fuller evidence regarding the existence or non-existence of the alleged custom should be forthcoming.

For the foregoing reasons their Lordships would humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the plaintiff (the first respondent).

Solicitors for Appellant: *Lambert and White.*

Solicitors for Respondents: *Douglas, Grant and Dold.*

H.J.U./V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)[2]

PRESENT:—LORD MACMILLAN, LORD SIMONDS, LORD DU PARCQ, MR. M. R. JAYAKAR AND SIR MADHAVAN NAIR.

The Province of Bombay .. *Appellant**

v.

The Municipal Corporation of the City of Bombay and another .. *Respondents.*

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1. (1913) L.R. 40 I.A. 156: I.L.R. 40 Cal. 879 (P.C.). 2. I.L.R. (1944) Bom. 95: 45 Bom.L.R. 945.

* P. C. Appeal No. 55 of 1945. 10th October, 1946.

Crown—When bound by statute—City of Bombay Municipal Act (III of 1888), sections 222 (1) and 265 —Crown if bound by.

The principle to be applied for the decision of the question whether or not the Crown is bound by a statute is no different in the case of Indian legislation from that which has long been applied in England.

The maxim of the law in early times in regard to the principle to be applied was that no statute bound the Crown unless the Crown was expressly named therein. But the rule so laid down is subject to at least one exception. The Crown may be bound "by necessary implication." That is to say, if it is manifest from the very terms of the statute, that it was the intention of the Legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.

To interpret the principle "that the Crown is not bound by legislation in which it is not named expressly or by necessary implication" as meaning that if it can be shown that legislation "cannot operate with reasonable efficiency unless the Crown is bound, that would be a sufficient reason for saying that the Crown is bound by necessary implication" would be to whittle it down and there is no authority which gives support to such an interpretation.

The proposition that whenever a statute is enacted "for the public good" the Crown, though not expressly named, must be held to be bound by its provisions, though supported by early authority cannot now be regarded as sound except in a very limited sense. All that can be said is that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound.

No distinction can be drawn in this respect between property held *jure coronae* and other property of the Crown where the regulations are meant to apply to all the land in a city.

The Crown is not bound by sections 222 (1) and 265 of the City of Bombay Municipal Act.

Judgment of the High Court[1], reversed.

Millard Tucker, K.C. and *Bagram* for Appellant.

Page, K.C. and *Jopling* for Respondents.

Their Lordships' Judgment was delivered by

LORD DU PARCQ.—By a written agreement dated the 1st March, 1943, the parties to this appeal concurred in stating a special case for the opinion of the High Court of Bombay. The question of law for the opinion of the Court was :— " Whether the Crown is bound by sections 222 (1) and 265 of the City of Bombay Municipal Act." The High Court (Sir John Beaumont, C.J. and Rajadhyaksha, J.)[1] declared that the Crown was bound by these sections, and, in accordance with the agreement between the parties, made an order as to costs in the respondents' favour. The present appeal is against this decision.

The City of Bombay Municipal Act, 1888, has twenty-one chapters and 528 sections and covers, as might be expected, a wide field. Chapter X deals with water-supply. Section 265, which is in this chapter, is as follows :—

"The Commissioner shall have the same powers and be subject to the same restrictions for carrying, renewing and repairing water-mains, pipes and ducts within or without the city, as he has and is subject to under the provisions hereinbefore contained for carrying, renewing and repairing drains within the city."

The terms of this section thus necessitate a reference to Chapter IX, which has for its subject "Drains and Drainage-works," and contains section 222 (1), which says :—

"The Commissioner may carry any municipal drain through, across or under any street, or any place laid out as or intended to be a street, or under any cellar or vault which may be under any street, and, after giving reasonable notice in writing to the owner or occupier, into, through or under any land whatsoever within the city, or, for the purpose of outfall or distribution of sewage, without the city."

1. I.L.R. (1944) Bom. 95 : 45 Bom.L.R. 945.

It appears from the special case, and from the correspondence annexed thereto that the Corporation wished to lay a water-main in a road known as Antop Hill Road, for the convenience of residents in the district known as Antop Hill. The case states that "the land in the locality of Antop Hill is for the most part private land belonging to the Government of Bombay, and the road serving the locality, known as Antop Hill Road, is also a private road belonging to the Government and in charge of the Public Works Department." The meaning of the expression "private land belonging to the Government" is obscure, but the correspondence suggests that the land forms a residential district in which Government employees (among others) are housed, and counsel were agreed that for the purposes of this appeal it might be assumed that it had been acquired by the Crown from private owners after the passing of the Municipal Act.

In these circumstances the Corporation's hydraulic engineer sought to obtain permission from the Provincial Government to lay the required water-main along the Antop Hill Road. The Government was willing to consent, but only subject to four conditions, two of which the corporation regarded as objectionable. The two conditions to which objection was made were (1) that the Corporation should, on twelve months' notice, remove the water-main and restore the land to its original condition, (2) that the Corporation should pay in advance a rental of one rupee per annum. Eventually the Commissioner (the second respondent to this appeal), in purported exercise of his powers under sections 265 and 222 (1), gave notice of his intention to carry out the proposed work. There followed the agreement under which the question in issue was submitted to the High Court.

The High Court held, following previous decisions of its own, that the principle to be applied for the decision of the question whether or not the Crown is bound by a statute is no different in the case of Indian legislation from that which has long been applied in England. The parties concurred in accepting this view, and their Lordships regard it as correct.

The general principle to be applied in considering whether or not the Crown is bound by general words in a statute is not in doubt. The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein, "Roy n'est lie per ascum statute si il ne soit expressment nosme." But the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, "by necessary implication." If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the Legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.

In the judgment delivered by the learned Chief Justice, in which Rajadhyaksha, J., concurred, the principle "that the Crown is not bound by legislation in which it is not named expressly or by necessary implication" was in terms accepted, but an interpretation was placed upon it which their Lordships are unable to approve. After stating the principle in the words just quoted, the learned Chief Justice went on to say that if it can be shown that legislation "cannot operate with reasonable efficiency unless the Crown is bound, that would be a sufficient reason for saying that the Crown is bound by necessary implication" and he concluded his judgment by enunciating the proposition that if the provisions of the Act "cannot operate efficiently and smoothly unless the Crown is bound . . . . the Crown must be held to be bound by necessary implication." Applying the general principle in this sense, and in the light of the knowledge which the Court had of existing conditions in Bombay, the Chief Justice came to the conclusion that the Corporation could not be sure of carrying out its statutory duty efficiently unless it had the same powers in relation to the Crown as it possessed in respect of the subject. The High Court therefore held that the question put in the special case must be answered in the affirmative.

Even if the High Court were correct in its interpretation of the principle its method of applying it would be open to the objection that regard should have been had, not to the conditions which it found to be in existence many years after the passing of the Act, but to the state of things which existed, or could be shown to have been within the contemplation of the Legislature, in the year 1888. It may also be objected that the view taken by the High Court appears to ignore the possibility that the Legislature may have expected that the Crown would be prepared to co-operate with the Corporation so far as its own duty to safeguard a wider public interest made co-operation possible and politic, and may well have thought that to compel the Crown's subservience to the Corporation beyond that point would be unwise. As was pointed out by Wills, J., in *Gorton Local Board* v. *Prison Commissioners*[1] it may be reasonable to suppose that the Legislature has no less confidence in a department which represents the Crown than in a local authority.

Apart from these considerations, however, their Lordships are of opinion that to interpret the principle in the sense put upon it by the High Court would be to whittle it down, and they cannot find any authority which gives support to such an interpretation.

It was contended on behalf of the respondents that whenever a statute is enacted "for the public good" the Crown, though not expressly named, must be held to be bound by its provisions and that, as the Act in question was manifestly intended to secure the public welfare, it must bind the Crown. This contention, which did not meet with success in the High Court, was again raised before their Lordships. The proposition which the respondents thus sought to maintain is supported by early authority, and is to be found in Bacon's Abridgement and other text-books, but in their Lordships' opinion it cannot now be regarded as sound except in a strictly limited sense. Every statute must be supposed to be "for the public good," at least in intention, and even when, as in the present case, it is apparent that one object of the Legislature is to promote the welfare and convenience of a large body of the King's subjects by giving extensive powers to a local authority, it cannot be said consistently with the decided cases, that the Crown is necessarily bound by the enactment. In the recent case of *The Attorney-General* v. *Hancock*[2], Wrottesley, J., cited a series of decisions in which the Crown was held not to be bound although the statute in question was clearly for the public benefit. A plain and striking example is the case which their Lordships have already cited of *Gorton Local Board* v. *Prison Commissioners*[1], where it was held that a by-law, made under the Public Health Act, 1875, and clearly designed to safeguard the health of the public did not bind the Crown, and gave the local board no control over one of His Majesty's prisons. In the present case the High Court disposed of the submission by a finding that, on the material before them, it was not shown to be for the public good that the Crown should be bound by the Municipal Act. This is perhaps not a wholly satisfactory way of dealing with the respondents' contention, which was, not that the Court must consider whether it is for the public good that the Crown should be bound by a particular Act, but that wherever an Act is "for the public good" it must be taken to bind the Crown. Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the Court is asked to draw this inference, it must always be remembered that, if it be the intention of the Legislature that the Crown shall be bound nothing is easier than to say so in plain words.

It is necessary to deal here with one further point which was not argued before the High Court. While this appeal was under their Lordships' consideration,

1. (1904) 2 K.B. 165 (n) at 168. 2. (1940) 1 K.B. 427 at 435.

their attention was directed to some weighty observations in two Scottish cases which suggested a possible answer to the Crown's claim to exemption. These observations are to be found in *Somerville* v. *The Lord Advocate*[1] (particularly in the judgment of Lord Kyllachy (at pp. 1064, 1065) and in *Magistrates of Edinburgh* v. *The Lord Advocate*[2] per Lord Dunedin (then Lord President) at pp. 1090, 1091). It will be sufficient to quote a passage from the judgment of Lord Dunedin in the latter case, in which he said :—

"I may say that I agree personally with the views expressed by Lord Kyllachy in Somerville's case, and I think the outcome of it is this : While I do not doubt that there are certain provisions by which the Crown never would be bound unless that were clearly expressed—such, for instance, as the provisions of a taxing statute or certain enactments with penal clauses adjected, as, for example, certain provisions of the Motor Car Act, and so on—yet, when you come to a set of provisions in a statute having for its object the benefit of the public generally, there is not an antecedent unlikelihood that the Crown will consent to be bound, and this, I think, would be so in the case of regulations which are meant to apply to all the land in a city, and where the Crown's property is not property held *jure coronae*, but has been acquired from a subject-superior for the use of one of the public departments."

In the present case it appears that the land of the Crown is not held *jure coronae* but, as has been said, was acquired from private owners, so that the dicta of the learned Lord President are directly in point. Their Lordships thought it right to require further argument on this aspect of the appeal, but, after careful consideration, remain of opinion that the law of England, and of India, is what they have stated it to be, and that no distinction can be drawn in such a case as the present between property held *jure coronae* and other property of the Crown. The view expressed in the Scottish cases has not been adopted in England, and does not seem to their Lordships to be in accordance with a body of English authority which, where an ancient doctrine of the common law of England is in question, ought in their Lordships' opinion to prevail.

Their Lordships have accordingly considered the question before them in the light of the principle as they have stated it. In so stating it their Lordships believe that they have done no more than express in their own words a well-settled proposition of law, and they need only refer, in addition to the cases already cited, to *Hornsey U.D.C.* v. *Hennell*[3] and *Cooper* v. *Hawkins*[4]. After full consideration their Lordships can find no reason to say that, by necessary implication, the Crown is bound by the relevant sections of the Municipal Act. They were pressed with the argument that such an inference might be drawn from certain express references to the Crown in other parts of the Act itself and from the fact that by the Government Building Act, 1899, the Legislature had provided for the exemption of Government buildings from certain municipal laws. The argument was that no express provisions saving the rights of the Crown would be necessary if the Crown were already immune. This is not an unfamiliar argument, but, as has been said many times, such provisions may often be inserted in one part of an Act, or in a later general Act, *ex abundanti cautela*, and, so far as the Act of 1899 is concerned, it is fallacious to argue that the Legislature which passed it must have had in mind the particular sections of the Act of 1888 which are now under review or that it was impliedly interpreting those sections.

For these reasons their Lordships have come to the conclusion that the appeal ought to be allowed. The decree of the High Court should be set aside, and a decree substituted declaring that the Crown is not bound by sections 222 (1) and 265 of the City of Bombay Municipal Act, 1888, and ordering that, in accordance with the agreement between the parties, the defendants (the respondents to this appeal) shall bear their costs and pay the plaintiff its costs of the special case. The costs of this appeal must be paid by the respondents. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for Appellant: *Solicitor, India Office.*

Solicitors for Respondents ; *Sanderson Lee and Co.*

H.J.U./V.S. *Appeal allowed.*

1. 20 R. 1050.
2. (1912) S. C. 1085.
3. (1902) 2 K.B. 73.
4. (1904) 2 K.B. 164.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Manicka Nainar .. *Appellant**

v.

Murugesa Goundan .. *Respondent.*

Provincial Insolvency Act (V of 1920), sections 78 (2) and 49—Operation of section 78 (2), if confined only to cases of debts proved according to section 49—Statement filed in Court by debtor under section 13 of the Act, if can amount to proof of the amount actually owing under a decree.

The operation of section 78 (2) of the Provincial Insolvency Act is not confined to the narrow limits of section 49 of the Act, but can be applied where there exists on the record of the Insolvency Court sufficient evidence to establish the debt due which the Insolvency Court was bound to accept. It must, of course, be proof before the Insolvency Court.

In execution of a money decree of September, 1927, the judgment-debtor was arrested in December, 1935, and liberated on his undertaking to apply for adjudication in insolvency. He was on his own application, eventually adjudicated in September, 1936; but the adjudication was annulled in September, 1940, as the insolvent had failed to apply for his discharge within the stipulated period. The decree-holder, who though he had not tendered proof of his debt to the Official Receiver, applied in December, 1942, for the execution of his decree claiming to be entitled to the benefit of section 78 (2) of the Provincial Insolvency Act. It was pleaded in bar of execution that the case fell within the proviso to sub-section (2) of section 78 as the decree-holder had not proved his debt in insolvency,

Held, that in the circumstances, as there was no proof of the insolvent's debt to the decree-holder in the insolvency proceedings, the latter was not entitled to the benefit of section 78 (2). Even if the insolvent had in his statement filed under section 13 of the Act given the particulars of the decree that would not in itself amount to proof of the amount actually owing under the decree. If the Official Receiver, whose duty it is to settle the list of creditors, had included the decree-holder in such list and shown the amount due to him, the Court would be justified in holding that the debt had been proved, but that was certainly not so in the present case.

Appeal against the order of the District Court of North Arcot, dated 28th March, 1945, and made in A. S. No. 397 of 1944 (R. E. P. No. 459 of 1943, District Munsiff's Court, Tiruvannamalai) in O. S. No. 175 of 1926, District Munsiff's Court, Arni).

V. Ramaswami Aiyar for Appellant.

T. K. Subramania Pillai for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The question here is whether a money decree obtained by the appellant against the respondent in the Court of the District Munsiff of Arni on the 13th September, 1927, is barred by the law of limitation. Between the date of the decree and the 28th of September, 1935, the decree-holder filed on different dates three applications for execution. These applications kept the decree alive. On the 28th September, 1935, he filed a fourth application for execution, which resulted in the District Munsiff ordering the respondent's arrest on the 16th December, 1935. He was liberated at once as he undertook to apply under the provisions of section 55 (4) of the Code of Civil Procedure for adjudication in insolvency. On the same day he filed in the Court of the Subordinate Judge, Vellore, an application for adjudication and on the 20th December, 1935, he was granted interim relief from arrest. Thereupon the District Munsiff dismissed the application for execution. On the 2nd September, 1936, the respondent was adjudicated an insolvent in the Court of the Subordinate Judge. He failed to apply within the stipulated period for his discharge and consequently on the 25th September, 1940, the order of adjudication was annulled under section 43 of the Provincial Insolvency Act. On the 20th December, 1942, the decree-holder filed another application for execution. He claimed to be entitled to the benefit of section 78 (2) of the Provincial Insolvency Act. The application was opposed on the ground that the case fell within the proviso to sub-section (2) to section 78 as the decree-holder had not proved the debt in the insolvency proceedings. This objection was accepted by the District Munsiff, whose decision was upheld by the

* A. A. A. O. No. 260 of 1945. 18th November, 1946.

District Judge of Vellore on appeal. The present appeal is from the order of the District Judge. The appeal first came before Rajamannar, J., who referred it to a Bench for hearing as there is conflict in the judgments of this Court which have bearing on the case.

Section 33 of the Provincial Insolvency Act provides that when an order of adjudication has been made, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under the Act shall tender proof of their respective debts by producing evidence of the amounts and particulars thereof. It is the duty of the Court to examine the amounts owing to the creditors and to frame a schedule of them and their debts. Section 49 states that a debt may be proved under the Act by delivering, or sending by post in a registered letter, to the Court an affidavit verifying the debt. The affidavit shall contain or refer to a statement of account showing the particulars of the debt and shall specify the vouchers by which it can be substantiated. The Court has the right to call for the production of the vouchers. Section 78 (2) provides that where an order of adjudication has been annulled under the Act, in computing the period of limitation prescribed for a suit or an application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-section (2) of section 28) which might have been brought or made but for the making of an order of adjudication under the Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded; but the section goes on to state that nothing in it shall apply to a suit or application in respect of a debt provable, but not proved, under the Act. Does the proviso mean that the debt must be proved by the method contemplated in section 49 or does it leave it open to the Court to accept other proof? It is on this question that there is a conflict of authority.

In *Krishna Chandra* v. *Jotindra Nath*[1], a Bench of the Calcutta High Court expressed the opinion that section 49 only specifies a simple mode of proof and does not exclude any other mode. In that case, the judgment-debtor was adjudicated an insolvent during the pendency of execution proceedings. In the schedule which he filed he described the decree-holder as his only creditor. The executing Court stayed the execution and directed the decree-holder to produce a copy of the insolvency proceedings. He failed to do so whereupon his application for execution was dismissed. In a later execution the question was whether section 78 of the Provincial Insolvency Act applied. The Court held that the statement by the insolvent in the insolvency proceedings that the decree-holder had obtained a decree against him amounted to proof of the debt within the contemplation of the section. We consider that this decision is open to criticism because the admission of an insolvent that he owes a debt does not in itself constitute proof of the debt, although the admission may be used against him. An insolvent might falsify his schedule for ulterior purposes and such cases have been known.

In *Ramalinga Aiyar* v. *Rayalu Aiyar*[2], a Bench of this Court (Venkatasubba Rao and Madhavan Nair, JJ.) accepted the principle that proof was not confined to the manner of proof contemplated by section 49 and held that where a decree had been obtained against the Official Receiver after an order of adjudication, that in itself was sufficient proof of the debt within the meaning of section 78 (2). In *Ramalinga Aiyar* v. *Subba Aiyar*[3], the same learned Judges accepted as proof of the debt factors which were also not in accordance with section 49. On the other hand, Krishnaswami Aiyangar, J., held in *Lachmiram Firm* v. *Parandamayya*[4], that the word "proved" in section 78 (2) meant "proved" in accordance with section 49.

The word "proved" in section 78 (2) does not imply that the Insolvency Court must have accepted the proof tendered. In *Lakshmi Bai* v. *Rukmaji Rao*[5], Beasley, C.J., held that the word covered the case where proof of the debt had been lodged and all the requirements of section 49 had been fulfilled. The Privy Council

1. A.I.R. 1929 Cal. 159.
2. (1929) 58 M.L.J. 170: I.L.R 53 Mad. 243.
3. A.I.R. 1933 Mad. 168.
4. (1940) 2 M.L.J. 17: I.L.R. 1941 Mad 136.
5. (1934) 67 M.L.J. 45 : I.L.R. 57 Mad. 767.

gave a pronouncement to the same effect in *Govind Prasad* v. *Paonkumar*[1]. Therefore compliance with section 49 will save limitation running while the order of adjudication remains in force. Surely *a fortiori* section 78 (2) will apply when there exists on the record of the Insolvency Court evidence of the debt which the Court is bound to accept. In our opinion the operation of section 78 (2) is not confined to the narrow limits of section 49, but can be applied where there is sufficient evidence on the record to establish the debt. It must, of course, be proof before the Insolvency Court.

In the present case there was no proof of the respondent's debt to the appellant in the insolvency proceedings. We have sent for and have examined the record of the Insolvency Court. The petition on which the adjudication was made is missing, but it is clear that the respondent applied for his adjudication because he had been arrested in execution of a decree. The order of adjudication is extant. It shows that the order was passed because none of the creditors objected.

Mr. Ramaswami Aiyar on behalf of the appellant has contended that by reason of the provisions of sections 13 and 24 of the Provincial Insolvency Act, the debt must be deemed to have been proved. We cannot accept this contention. Section 13 states what his petition for adjudication shall contain. Where he has been arrested in execution of a decree he is required to give particulars of the decree. Whether the respondent did so in this case does not appear. Presumably he did so, but the statement filed in Court under section 13 would not in itself amount to proof of the amount actually owing under the decree. Section 24 states what the Court shall require proof of at the hearing. Where the debtor is the petitioner he shall for the purpose of proving his inability to pay his debts be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing the same. If the Court is satisfied that there are *prima facie* grounds it shall not be bound to hear further evidence. There is absolutely no indication on the record of what happened in Court when the adjudication order was passed beyond the fact that it was passed without objection from the creditors. Even if the respondent had prepared a schedule of his debts and included therein the amount of the decree passed in favour of the appellant, this, as we have already indicated, would not amount to proof of what was due under it.

It is the Official Receiver's duty to settle the list of creditors and he prepared a schedule, but the appellant's name is not included therein. If the Official Receiver had included the appellant in the list and shown the amount due to him the Court would be justified in holding that the debt had been proved, but that is certainly not the case here. We may add that it was found by both the Courts below that no proof of the debt was tendered to the Official Receiver.

In these circumstances the appellant is not entitled to the benefit of section 78 (2) of the Act and his appeal must be dismissed without costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUPPUSWAMI AYYAR.

M. T. Parthasarathy Iyengar .. *Appellant**

v.

M. T. Pankajammal and another .. *Respondents.*

Hindu Law—Settlement deed—Construction of—Adoptive father's gift to the son to be adopted—Whether a gift in presenti.

A Hindu while adopting the plaintiff as his son wished to make some provision for his wife and a settlement deed executed at that time after settling some property on his wife for life, recited.

1. I.L.R. (1943) Nag. 669.

* L. P. A. No. 24 of 1946. 18th July, 1946.

"After your lifetime, the aforesaid boy whom we are going to adopt shall take possession, hold and enjoy the aforesaid house and site with absolute right and title. You shall enjoy only the rent-income from the aforesaid house, as mentioned above, till your lifetime, and you shall have no power to subject the aforesaid house and site to any encumbrances or alienations such as mortgage, sale, etc. In the event of your death during my life time, I shall enjoy the aforesaid house and site subject to the conditions aforesaid."

On a construction of the deed,

Held, that the document should be read as conveying an absolute interest to the plaintiff on the death of the adoptive parents. It cannot be said that there was no gift *in presenti*. Nor was there any intention on the part of the executant of the settlement deed that the adopted boy had to share the property with any other son that might be born to the executant subsequently.

Judgment of Rajamannar, J., in (1945) 2 M.L.J. 453, reversed.

Appeal under clause 15 of the Letters Patent against judgment and decree of the Hon'ble Mr. Justice Rajamannar dated 14th September, 1945[1] and passed in C. C. C. A. No. 12 of 1945 preferred against the decree of the City Civil Court, Madras, in O. S. No. 1581 of 1945.

T. M. Venugopala Mudaliar for Appellant.

Ch. Raghava Rao and *M. E. Rajagopalachari* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal under clause 15 of the Letters Patent from a judgment of Rajamannar, J.,[1] reversing a decree of the City Civil Court. The suit was filed by the appellant who is the adopted son of one Thiruvengadachari and his wife Alangarammal, both of whom are now dead. The plaintiff claimed possession of a house with mesne profits by virtue of a deed of settlement dated the 11th July, 1930. The City Civil Court held that the plaintiff was entitled to the relief asked for as he took an absolute interest in the property on the death of his adopted father. Rajamannar, J., considered that the deed did not operate as a settlement on the son and consequently he allowed the appeal. We are of the opinion that the deed does operate as a settlement in favour of the plaintiff.

In 1930, Thiruvengadachari was 62 years of age. He had decided to adopt the plaintiff, but he was anxious that some provision should be made for the maintenance of his wife, should he predecease her. The deed of the 11th July, 1930, recites these facts. After the settlement of the property on his wife for life, there are these statements in the deed :

"After your lifetime, the aforesaid boy whom we are going to adopt shall take possession, holp and enjoy the aforesaid house and site with absolute right and title. You shall enjoy only the rent-income from the aforesaid house, as mentioned above, till your lifetime, and you shall have no power to subject the aforesaid house and site to any encumbrances or alienations such as mortgage, sale, etc. In the event of your death during my lifetime itself, I shall enjoy the aforesaid house and site, subject to the conditions aforesaid."

We have here a direction that the boy to be adopted was to take the property absolutely after the death of his adoptive mother, but should the settlor's wife predecease him, he himself should take a life-interest in the property but subject to the conditions which applied to his wife, namely, that he should enjoy the property during his lifetime without power of alienation and on his death it should go to the boy to be adopted.

Rajamannar, J., considered that there was here no gift *in presenti*. With great respect we do not share his opinion. We consider that the document must be read as conveying an absolute interest to the plaintiff on the death of his adoptive parents. The adoption took place two days later and was evidenced by a deed under which the adoptive father conveyed to the plaintiff the property which he himself had received at a partition with his brothers.

It is manifest that Thiruvengadachariar did not contemplate a second marriage but his wife died in 1931 and soon after, he married the first defendant by whom he had a son, the second defendant. Thiruvengadachariar died in 1941. From what we have said it follows that in our judgment, on his death, the plaintiff took the property in suit absolutely.

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1. (1945) 2 M.L.J. 453.

Mr. Raghava Rao, on behalf of the contesting defendants, has suggested that the house in suit becomes ancestral property in the hands of the plaintiff. He raised this question before Rajamannar, J., but it was not accepted. The learned Judge said that if it were necessary he would be prepared to hold that there was no intention on the part of the executant that the adopted boy had to share the property with any other son that might be born to him subsequently. We agree with this observation and it disposes of the last contention of Mr. Raghava Rao.

The appeal is allowed and the decree of the trial Court restored with costs throughout.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE GOVINDARAJACHARI.

B. Subramania Iyer .. *Appellant* in all the appeals.*

v.

The Podanur Bank, Limited (in Liquidation), Tiruvadamarudur, by its Official Liquidator .. *Respondent in all the appeals.*

Companies Act (VII of 1913), section 237—Direction for prosecution—Opportunity to delinquents to show cause against—Necessity—Desirability of giving reasons for the order in appealable cases—Principles which should govern the Court in deciding whether or not to prosecute the delinquent officers.

Section 237 (1) of the Companies Act does not in terms require the Court to make any particular enquiry or to give to the person who is to be prosecuted an opportunity to show cause before the Official Liquidator is directed to file a complaint, and especially, when there has been a very full investigation and an adequate opportunity has been given to the directors and the Secretary to exculpate themselves from the charges against them, the order for prosecution cannot be set aside merely because it was passed *ex parte.*

There is no provision in section 237 of the Act requiring the Court to set forth its reasons when directing the liquidator to launch prosecutions; and although it is obviously desirable whenever a Court passes an appealable order that some indication should be given that the Court has applied its mind to the questions which have to be decided in passing the order, the order is not necessarily to be vacated, merely because it does not itself set forth the reasons which caused the Court to pass it, and particularly when there is sufficient material on record.

Where objection to the prosecution of the delinquent officers of a company was put forward only by shareholders whose holdings were infinitesimal and a single creditor and was not put forward until after the District Judge had come to the conclusion that proceedings ought to be taken and there did not appear to be any wide divergence of views on the part of the general body of shareholders or creditors on the question as to the desirability of launching the prosecutions and the probable costs of such prosecutions were not likely to diminish very seriously the dividend which the creditors could expect to get,

Held, that the circumstances did not justify an interference with the order of the District Judge directing the launching of prosecutions, either on the ground that the District Judge had not given proper consideration to the financial implications of his order or that it did not indicate the grounds of his decision.

In re *Northern Counties Bank, Ltd.*, (1883) 31 W.R. 546; Re *Charles Denham & Co., Ltd.*, 51 L.T. 570 and *London and Globe Finance Corporation, Ltd.*, In re, (1903) 1 Ch.D. 728, referred to.

Appeals against the Orders of the District Court of West Tanjore, dated 29th March, 1946, and made respectively in Proceedings Nos. 2438, 2443, 2441, 2445, 2444, 2439, 2440 and 2442 in O. P. No. 9 of 1943.

G. R. Jagadisa Aiyar for Appellant.

M. S. Krishnamurthi Sastri for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.—These appeals arise out of a series of orders directing the Official Liquidator of the Podanur Bank, Ltd., Tiruvadamaruthur, to prosecute the appellant, his co-directors and the Secretary of the Company for offences under the penal provisions of the Indian Companies Act. That the orders in question are appealable under section 202 of the Indian Companies Act is established so far as this Court is concerned by the decisions in *Kesavaloo Naidu* v. *Murugappa Mudali*[1] and *Chockalingam* v. *Official Liquidator*[2]. The winding up of the Company was

* A. A. Os. Nos. 216 to 219 and 340 to 343 of 1946. 18th November, 1946.

1. (1906) 16 M.L.J. 537 : I.L.R. 30 Mad. 22.
2. (1943) 2 M.L.J. 499 : I.L.R. 1944 Mad. 540.

ordered by the learned Judge on the Original Side of this Court in January, 1943, and further proceedings were to be in the Court of the District Judge of West Tanjore. On 3rd November, 1943, an application was filed under section 235 of the Indian Companies Act alleging various acts of misfeasance, etc., on the part of the directors and the Secretary and asking the Court to require the respondents to make good the loss occasioned by their default. In the enquiry into this petition interrogatories were served on the respondents and an opportunity was given to them to state their case and to be represented by their counsel. The enquiry was very prolonged and on 31st July, 1945, the District Judge wrote a detailed order in the course of which he expressed the opinion that whereas the guilt of the Secretary was fairly clear, so far as the directors were concerned it is a matter of considerable difficulty to decide whether they were merely culpably negligent, or were conniving parties to the fraudulent concealment of facts from the general body in the balance sheets, or the alleged unauthorised and fraudulent sales. The learned District Judge came to the conclusion that further investigation was necessary to establish *prima facie* the criminal liability of the directors and for the preparation of false balance sheets or for fraudulent sales. He seems to have been influenced by an offer made by counsel on their behalf to purchase the unsold decrees and make good any losses so that payment in full may be made. The learned District Judge therefore directed the Official Liquidator to make a report to the Police and if possible to procure a special officer of the Criminal Investigation Department to make further investigation. Meanwhile the petition was treated as "closed." On 17th February, 1946, the reports of the Special Investigation Officer was received and on the 19th February, the Official Liquidator applied for the revival of the application praying that the directors and the Secretary should make good the losses to the Company. On 20th February, 1946, the learned District Judge passed *ex parte* proceedings reviving the former application and directing notices to the respondents and he also passed a very unsatisfactory order authorising the liquidator to prosecute "any director, manager or other officer for any offence which might have been committed." This latter order has been set aside in our judgment in C. M. A. No. 197 of 1946, as being obviously defective. On 13th March, 1946, that is to say, nearly a month after this order for prosecution had been passed, I. A. No. 96 of 1946 was preferred by two shareholders and one creditor asking the Court to direct the sale of the unrealised assets and the distribution of a further dividend out of the balance in the hands of the liquidators and also asking that the prosecution already ordered should not be financed out of the funds of the Company. At the same time there was a further petition, I. A. No. 97 of 1946, in which the same petitioners prayed for an interim stay of the proceedings for the prosecution of the directors and the secretary. The latter application was dismissed on the 14th March. On the 29th March, the learned District Judge adjourned I. A. No. 96 of 1946 and at the same time *suo motu* he passed orders for the prosecution of the directors and the Secretary for the offences they were alleged to have committed under the provisions of the Companies Act. It is these orders which are challenged in the appeals now before us.

The contentions taken in the various Memoranda of appeals are that the orders were illegal in that they were passed without notice to the persons sought to be prosecuted, without enquiry into the question of the desirability of the prosecutions without any materials or legal evidence justifying the prosecutions and without consultation of the creditors or shareholders who were affected by the charging of the costs of prosecution to the Company's assets.

Section 237 (1) of the Indian Companies Act runs as follows :

"If it appears to the Court in the course of a winding up by, or subject to the supervision of, the Court that any past or present director, manager or other officer, or any member, of the Company has been guilty of any offence in relation to the Company for which he is criminally liable, the Court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator either himself to prosecute the offender or to refer the matter to the registrar."

This section does not in terms require the Court to make any particular enquiry or to give to the person who is to be prosecuted an opportunity to show cause before

the Official Liquidator is directed to file a complaint. On the facts of the present case it would appear that in the Official Liquidator's own enquiry the directors and the Secretary had been given every opportunity to put forward their version of the facts on the various charges of misfeasance which are substantially the matters forming the foundation for the present prosecutions. Seeing that the section contemplates action by Court not merely at the instance of third parties but also on its own motion, we do not think that it can be laid down as an absolute rule that the Court must call upon the persons concerned to show cause before it directs their prosecution. When as in this case there had been a very full investigation and an adequate opportunity had been given to the directors and the Secretary to exculpate themselves from the charges against them we do not think that the order for prosecution can be set aside merely becaues it was passed *ex parte*.

On the question of lack of materials before the learned District Judge there were no doubt very considerable materials before him at the time when he passed his order of 31st July, 1945. Those materials were, so far as directors were concerned, apparently sufficient only to convince the District Judge that they were either culpably negligent or were conniving parties to the fraudulent concealment of facts from the general body in the balance sheets and the other misfeasances alleged. At the time when the orders now under appeal were passed the learned District Júdge had also before him the report of the Special Investigating Officer which unfortunately was treated as confidential. We cannot see what was the necessity for treating this report as confidential since substantially everything it contained had necessarily to be made public as soon as the prosecution started. The effect of this rather misguided secrecy is certainly to make it more difficult for any one interested to challenge or support the correctness of the orders of the learned District Judge. Those orders themselves contain no statement of reasons whatever and they did not even contain sufficient materials to enable the appellate Court without further research to satisfy itself that the learned District Judge did give due consideration to the materials available. There is, however, no provision in section 237 of the Companies Act requiring the Court to set forth its reasons when directing the liquidator to launch prosecutions; and although it is obviously desirable whenever a Court passes an appealable order that some indication should be given that the Court has applied its mind to the questions which have to be decided in passing the order, it seems to us difficult to say that the order has necessarily to be vacated, merely because it does not itself set forth the reasons which caused the Court to pass it.

Section 202 of the Indian Companies Act confers a very wide right of appeal against the orders of a Court in the winding up of a Company and it is perhaps going too far to say that every order in such a matter which might conceivably form the subject of appeal, should contain a detailed exposition of the reasons supporting it. But we are of opinion that an order directing a prosecution which from its very nature is most likely to result in appeal and which involves a matter of very great importance to the person to be prosecuted, should be supported by some indication of the reasons which justify it. We do not, however, think that the order should be set aside merely because of its excessive brevity if it was in fact justified by the materials before the Court. We have ourselves examined the report of the Special Investigating Officer and we are of opinion that there were materials before the District Judge which justified him in directing a prosecution of the appellant for the offences alleged. That being so we do not think that it is necessary to set aside the order of the District Judge and require him to draw up a fresh order with an adequate statement of his reasons.

Mr. Jagadisa Aiyar for the appellant has strenuously argued on the authority of In re *Northern Counties Bank, Ltd.*[1], that the question whether a prosecution should be directed in the matter of the alleged misdeeds of directors of the Company is mainly a question whether having regard to the financial position of the Company

1. (1883) 31 W.R. 546.

and the desires of the share-holders and creditors, it is reasonable to saddle the assets of the company with the costs of prosecution. We do not read the case cited as laying down such a drastic rule and in fact the learned Judge who decided the case has himself in a later case *Re : Charles Denham and Co., Ltd.* [1], pointed out that the Court has a discretion to ignore the opposition of creditors to the prosecution if in its opinion the object of the opposition was not so much to save the Company's funds as to save the guilty director. The principles which should govern the Court in deciding whether or not to direct the prosecution of a delinquent director of a Company as part of the proceedings in liquidation have been laid down by Buckley, J., in *London and Globe Finance Corporation, Ltd.* [2]. The learned Judge says :

"What are the considerations which ought to govern it? The principle lies, I think, in the answer to the following question. If the persons at whose expense the prosecution would be instituted were not a class, but were a single person, and that person were an honest and upright man desirous as a good citizen of doing his duty by the State, are the circumstances such as that in discharge of that duty he would feel that he ought at his own expense and to his own loss to institute a prosecution? Not in every case in which a criminal offence has been committed would such an one think it his duty to prosecute. The question to be answered is, Would he in this case think his duty to the State required him to prosecute? If that question be answered in the affirmative, then, upon principle, I think that the Court ought to direct a prosecution. Further, I think that the Court can, and in a proper case ought to, direct a prosecution without the assent, and even notwithstanding the dissent, of the class or many of the class at whose expense the prosecution would be instituted."

Now what are the facts in the present case. The Company in liquidation had already paid a dividend of As. 10 in the rupee. The liquidator had in cash approximately Rs. 4,000 out of which Rs. 2,500 was set aside for a further dividend of As. 2. It is not shown that the balance after this distribution of As. 2 would not suffice for the costs of these prosecutions. The opposition to the prosecution was not put forward until after the District Judge had in his defective order of the 20th February, 1946, come to the conclusion that proceedings ought to be taken and then the objection was preferred by two share-holders whose holdings were infinitesimal and one creditor. There were no indications before the learned District Judge of any wide divergence of views on the part of the general body of share-holders and creditors such as would make it desirable for him to ascertain the wishes of the persons concerned before deciding to launch a prosecution. And the fact that a prosecution was likely to result from the investigation must have been well known to all parties long before the learned District Judge decided to prosecute. The probable costs of these prosecutions are not likely to diminish very seriously the dividend which the creditors can expect to get. We are not therefore disposed to interfere with the order of the learned District Judge on the ground that the District Judge did not give proper consideration to the financial implications of these orders. In the result, therefore, although we are definitely of the opinion that the orders of the learned District Judge should have been supported by some indication of the grounds of his decision, we are not prepared on that reason alone to interfere in appeal. The appeals are therefore dismissed with costs of the Official Liquidator in C. M. A. No. 216 of 1946.

V.P.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Srimanthu Rajah Yarlagadda Sivarama Prasad Bahadur Zamindar garu, Zamindar of Devakota, Chellapalli .. *Appellant**

v.

Jyoti Venkadu and others .. *Respondents.*

Madras Estates Land Act (I of 1908), Sec. 24—Enhancement of rent—Contract for payment of enhanced rent before passing of the Estates Land Act—If can be presumed from mere long continued payment at higher rate

1. 51 L.T. 570.
2. (1903) 1 Ch. D. 728.

* S. A. Nos. 1783 to 1788 of 1944. 3rd September, 1946.

If it is established that there was a valid enforceable contract between the landholder and the ryot in respect of the rate of rent of a particular holding which was in existence before the passing of the Estates Land Act such a contract would be enforceable notwithstanding the passing of the Estates Land Act and notwithstanding that its provisions are inconsistent with some of the provisions of the said Act. But the most important condition which the landholder will have to fulfil is to establish not merely an agreement which may be inferred from a long continued course of payment at a particular rate but an agreement supported by lawful consideration.

It cannot be contended that a Court can presume a contract to pay a higher rate of rent and a legal origin and consideration for it from the mere fact of long and continued payment of the higher rate. It is a question of fact on which a Court should give a finding taking into consideration all the relevant circumstances and evidence on record.

Periakaruppa Mukkandan v. *Raja Rajeswara Sethupathi*, (1918) 36 M.L.J. 320 : I.L.R. 42 Mad. 475 (F.B.) explained.

Sri Raja Bommadevara Chayadevamma v. *Venkataswami*, (1931) 62 M.L.J. 511, relied on.

Unless there is a valid contract, that is, an agreement supported by consideration the fact that the tenants have for long periods been paying at a higher rate would not itself entitle the landholder to enforce the rate when objection is made after the passing of the Act.

Raja Jagaveera Rama Venkateswara Ettappa v. *Arumugham*, (1918) 36 M.L.J. 49 : L.R. 45 I.A. 195 : I.L.R. 43 Mad. 174 (P.C.), referred to.

Appeal respectively against the decrees of the District Court of Kistna at Chillakalapudi in A. S. Nos. 171 to 176 of 1943, preferred against the decrees of the Court of the Deputy Collector, Bandar, in S. S. No. 755 of 1942, etc.

T. V. R. Thathachari for Appellant.

M. Appa Rao for Respondent.

The Court delivered the following

JUDGMENT.—These appeals arise out of suits filed by the appellant, the Zamindar of Devakota who is a landholder under the Estates Land Act, for recovery of rent against several tenants in his estates in the village of Endakuduru. The lands comprised in the holdings of the defendants were dry, mamool wet, and bapat wet. The landholder claimed assessment at the rate of Rs. 1-7-0 for dry lands, Rs. 5-13-0 for mamool wet and Rs. 2-12-0 for bapat wet lands. The Deputy Collector decreed the suits as prayed by the plaintiff. But on appeal the learned District Judge has modified the rate as regards bapat wet lands for which he has awarded at the rate of Rs. 1-7-0 per acre, *i.e.*, the rate pertaining to dry lands.

From the evidence on record it appears that the lands now described as bapat wet lands were originally dry but were converted into wet lands when they could be irrigated with the aid of the water from the Krishna Anicut. It is not suggested by the landholder either in the plaint or in the evidence that anything was done by him either before or after the Estates Land Act to enable the lands being cultivated with wet crops. The irrigation system admittedly does not belong to the Zamindar and the Estate's Zamindar is not able to suggest any improvements made by the Zamindar in respect of the lands now in suit. However it appears that there was an attempt on the part of the proprietor to levy an enhanced rate of rent in respect of these lands which, though originally dry, could after the introduction of the anicut system and the excavation of the connecting irrigation channels, be cultivated as wet. We find in certain muchilikas filed on the side of the plaintiff a clause providing enhanced rate of Rs. 2-12-0 per acre if wet crops were raised on the dry lands and another clause which says that in respect of dry bapat lands and the dry crops for which water will be taken from the anicut the ryot shall himself pay to the Government the water theerva which the Government may fix for them. It is also alleged by the landholder that for a continuous period of over thirty years the ryots have been paying without demur the enhanced rate for these bapat wet lands. He has not filed either the receipt counterfoils or collection accounts to show that actually the tenants had been paying the enhanced rate. Instead of following this obvious course he is rest content with an alleged admission in the written statement and in the evidence of the witnesses for the defendants that this enhanced rate was being paid.

The learned District Judge held that the evidence adduced by the plaintiff did not warrant him to imply a contract to pay the enhanced rent entered into

before the passing of the Estates Land Act. It is quite true that if it is established that there was a valid enforceable contract between the landholder and the ryot in respect of the rate of rent of a particular holding which was in existence before the passing of the Estates Land Act such a contract would be enforceable notwithstanding the passing of the Estates Land Act and notwithstanding that its provisions are inconsistent with some of the provisions of the said Act. But the most important condition which the landholder will have to fulfil is to establish not merely an agreement which may be inferred from a long continued course of payment at a particular rate but an agreement supported by lawful consideration.

As I have already mentioned, the landholder is not in a position to even suggest a possible consideration for the enhanced rate. His learned advocate merely falls back on a presumption of fact arising from a long course of payment at the enhanced rate. Assuming in his favour that he has established the fact of such payment, as to which I entertain considerable doubt, I am clearly of opinion that in this case, having regard to the other circumstances which certainly will have to be taken into account in arriving at a conclusion on this point, it is impossible to presume consideration for any agreement to pay enhanced rent. The learned advocate strongly relied on the decision of the Full Bench in *Periakaruppa Mukkandan* v. *Raja Rajeswara Sethupathi*[1], for the position that a Court can presume a contract to pay a higher rate of rent and a legal origin and consideration for it from a long continued payment of the higher rate. But I do not consider that the learned Judges in that case ever laid down that no circumstance other than long continued payment should be taken into account for arriving at a decision on the question whether the landholder was validly entitled to claim the higher rate. The learned Judges who formed the majority clearly lay down that if there be other evidence, that is, evidence other than continued payment of the higher rate, a Court cannot make any such presumption from such payment alone. It then becomes a question of fact on which a Court should give a finding, taking into consideration all the relevant circumstances and evidence on record. That this is the effect of the ruling of the Full Bench is also pointed out in *Sri Raja Bommadevara Chayadevamma* v. *Venkataswami*[2]. I respectfully agree with what fell from Anantakrishna Aiyar, J., in that case at page 524.

> "I do not understand any reported decision to lay down broadly that, even in the presence of other circumstances which may go against any presumptions that the Court would ordinarily be inclined to draw from the circumstance that the same state of things is shown to have continued for a long number of years, that the Court is bound to raise a presumption that there was a lawful origin for the same."

In *Raja Jagaveera Rama Venkateswara Ettappa* v. *Arumugham Chetti*[3], their Lordships of the Judicial Committee point out that unless there is a valid contract, that is, an agreement supported by consideration, the fact that tenants for long periods have been paying at a higher rate would not itself entitle the landholder to enforce that right when objection is made.

In this case, as I have already pointed out, the circumstances appearing from the record do not give any room for presuming a valid contract, that is, an agreement supported by consideration to pay this higher rent. As decided in *Srimathu Mallikarjun Prasad Naidu Bahadur* v. *Subbayya*[4], even under the Rent Recovery Act the landholder would not have been entitled to levy the enhanced rent when dry lands were converted into wet by a channel constructed and maintained solely by Government. It follows that even if there was a levy by the landholder in this case prior to the passing of the Estates Land Act such levy would have been illegal and surely the passing of the Estates Land Act cannot make it legal.

There are no grounds to disregard the finding of the learned District Judge that the landholder is not entitled to charge more than Rs. 1-7-0 per acre for the

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1. (1918) 36 M.L.J. 320 : I.L.R. 42 Mad. 475 (F.B.).
2. (1931) 62 M.L.J. 511.
3. (1918) 36 M.L.J. 49 : L.R. 45 I.A. 195 : I.L.R. 43 Mad. 174 (P.C.).
4. (1911) I.L.R. 36 Mad. 4.

bapat wet lands I find that in another batch of second appeals from the same village (S. A. Nos. 181 to 195 of 1944) my learned brother Chandrasekhara Aiyar, J. has taken the same view.

These second appeals are therefore dismissed with costs. Vakil's fee Rs. 15 in each case. Leave refused.

V.P.S. — *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Komirineni Rosayya and another .. *Appellants**

v.

Munnamgi Rosayya .. *Respondent.*

Evidence Act (I of 1872), section 157—Suit for ownership and possession—Recital in document executed by a witness to which none of the parties to the suit were parties—If relevant as corroborative evidence.

In a suit regarding ownership of a property a document to which none of the parties to the suit were parties was held to be admissible as one of the executants of the document had been examined as a witness and the recital in the document had been relied upon as corroborative of the evidence given by the party to the document who was examined as a witness. On a contention that the recital in the document is not admissible under section 157 of the Evidence Act by way of corroborative evidence,

Held, that if a statement that a particular property was in possession of a particular person in a particular period is relevant evidence of a fact that had taken place, the recital that the person owned it, also is a statement of fact that had taken place at the time when it was made. Possession is a legal conception as also ownership. If a particular statement about a particular individual that he was in possession of a property is relevant evidence of a fact that had taken place, then the fact that he owned it is also a similar recital of a fact that had taken place. The statement in the document in question was therefore relevant as corroborative evidence being a statement made by the witness on a previous occasion.

Thyagarajan v. *Narayana*, A.I.R. 1940 Mad. 450, referred to.

Appeal against the decree of the Court of the Subordinate Judge, Bapatla, in A. S. No. 16 of 1945, preferred against the decree of the Court of the District Munsiff, Bapatla, in O. S. No. 140 of 1943.

Ch. Raghava Rao for Appellants.

P. Satyanarayana Rao for Respondent.

The Court delivered the following

JUDGMENT.—Defendants 1 and 5 are the appellants and the appeal arises out of a suit filed by the plaintiff in ejectment and for recovery of profits. Defendants 1 and 5 are father and son. The plaintiff's case was that the defendants 1 and 5 were in possession of his lands as lessees, that they used to pay a particular rate of rent for some years, that when the rent was raised they did not pay it and that when they were asked to vacate, they obstructed the plaintiff from taking possession of the properties. The other defendants (defendants 2 to 4 and 6 to 9) are said to have helped them in the said obstruction. Defendants 1 and 5 pleaded that the properties had been sold by the plaintiff to them, that they had been in possession of the same all along and that the suit was barred by limitation by adverse possession. The other defendants pleaded that there was no cause of action as against them, that they did not obstruct the plaintiff and that the suit was liable to be dismissed so far as they were concerned.

Both the Courts have found that the property belonged to the plaintiff, that the plaintiff was in possession within 12 years prior to the suit and that the suit was not barred by limitation by adverse possession, that the transaction of defendants 1 and 5 was in the nature of a lease and not a sale and accordingly decreed the suit for possession against all the defendants and gave a decree for past profits and for costs against the first defendant. On appeal the decree of the lower Court was

* S. A. No. 1305 of 1945. 8th July, 1946.

confirmed. Four issues were framed which were all issues of fact and on all those issues the lower appellate Court found against the appellant. A second appeal herefore cannot lie on a decision of facts.

At the time when the second appeal was admitted, it was pointed out that Exs. P-2 and P-4 were inadmissible in evidence and that a judgment based on inadmissible evidence could be interfered with in second appeal. Ex. P-2 is a document which relates to a neighbouring land and not the suit land, but that was admitted in evidence because the second defendant was a party to that document and therefore it was admissible as against him. The judgment is not based merely on Ex. P-2 but is based on other evidence in the case and the learned judge had to consider the pleas of the various contesting defendants. A document which is admissible in evidence as against a particular individual has necessarily to be referred to in the judgment, and it cannot be said that, merely because the judgment makes reference to a particular document which is admissible as against one of the defendants, the judgment as against the other defendants is based on that document. The learned Judge has dealt with the oral evidence in two paragraphs of his judgment, and that was admissible as against all the defendants. I do not therefore think I will be justified in interfering with the judgment of the lower Court on the ground that Ex. P-2 is not admissible as against the appellants.

With regard to Ex. P-4 it is a document to which none of the parties to the suit were parties, but then, the Judge has definitely stated that it is admissible in evidence because one of the executants of the document had been examined as a witness and the recital about the particular property in dispute was relied upon as corroborative of the evidence given by the party to the document who was examined as a witness. It is urged before me that the recital is not admissible under section 157 by way of corroborative evidence. As was pointed out by Wadsworth, J., in *Thyagarajan* v. *Narayana*[1], it is not all previous statements made by a witness that can be relied as corroborative evidence. It must be a statement made as regards a fact which had taken place of a statement made before a properly constituted authority. Of course, the statement in question is not a statement made before any competent authority, but it is urged that it is not a statement of fact which had taken place. The recital is that a particular land belonged to a particular individual. In *Thyagarajan* v. *Narayana*[1], the recital was that a particular document was in possession of a particular person. Wadsworth, J., has held that it is a fact which had taken place and therefore the recital about that fact made in a previous document is relevant evidence under section 157. In this particular case, it is not clear whether the property was referred to as property in the possession of the person mentioned therein, or as property owned by that person. The words might mean either that the property was in the possession of the person stated or that the property was owned by the person. If a statement that a particular property was in possession of a particular person in a particular period is relevant evidence of a fact that had taken place, the recital that the person owned it, also is a statement of a fact that had taken place at the time when it was made. Possession is a legal conception as also ownership. If a particular statement about a particular individual that he was in possession of a property is relevant evidence of a fact that had taken place, then the fact that he owned it is also a similar recital of a fact that had taken place. I do not therefore think that the learned Judge was wrong in considering that it was relevant as corroborative evidence being a statement made by the witness on a previous occasion.

The second appeal fails and is accordingly dismissed with costs.

No leave.

K.C. ——— *Appeal dismissed.*

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1. A.I.R. 1940 Mad. 450.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Pavayammal and another .. *Petitioners**

v.

The District Board, Salem .. *Respondent.*

Madras Local Boards Act (XIV of 1920), *sections* 207 (2) *and* 223—*Prosecution under section* 207 (2) *for failure to vacate property even after conviction—Limitation—Starting point.*

The petitioners were prosecuted under section 164 (2) read with section 207 (1) of the Madras Local Boards Act for failure to comply with a notice to vacate certain property and were convicted on 11th March, 1944. As they did not vacate the property even after conviction, they were, some six months later, on 2nd September, 1944, prosecuted under section 207 (2) of the Act. On a contention that the complaint was barred by limitation by virtue of the provisions of section 223 of the Act inasmuch as it was brought more than three months after the prior conviction,

Held, that the complaint was not barred by limitation because the starting point of limitation for a continuing offence is not the date of conviction but the last date on which the offence is committed.

Bechardas v. *Emperor*, A.I.R. 1930 Bom. 340, Dissented from.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Stationary Sub-Magistrate of Rasipuram in C. C. No. 1085 of 1944.

D. Ramaswami Ayyangar for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Basheer Ahmed Sayeed for Respondent.

The Court made the following

ORDER.—The Salem District Board was entrusted with the management of a choultry and the property with which the choultry was endowed. On the ground that the petitioners had unauthorisedly occupied a portion of the property attached to the choultry, the District Board served them with a notice to vacate and then prosecuted them under section 164 (2) read with section 207 (1) of the Madras Local Boards Act on the ground that they had failed to vacate the land in contravention of the notice served on them. The petitioners were convicted on 11th March, 1944, but still did not vacate the property and some six months later, on 2nd September, 1944, the District Board prosecuted them under section 207, sub-section (2) of the Act. It appears that there is a civil suit pending between the District Board and the petitioners in regard to the title to the property in question but this suit was filed after the conviction in the first case, and an undertaking which the Board seems to have given not to evict the petitioners during the pendency of the suit was admittedly given after the accused had been convicted in the case out of which this petition arises. The civil proceedings are therefore not material.

Section 207, sub-section (2) provides that, if a person after conviction continues to contravene the provision of the Act in respect of which he has been convicted or to neglect to comply with the direction or requisition, he shall on conviction be punished, for each day after the previous date of conviction during which he continues so to offend, with fine which may extend to the amount mentioned in the fourth column of the schedule. It is not disputed that the petitioners, after their conviction for the contravention of the notice requiring them to vacate, have continued in possession of the property. Section 223 of the Local Boards Act, however, provides that, no person shall be tried for any offence against the provisions of the Act unless complaint is made within three months of the commission of the offence. In the present case the complaint was filed nearly six months after the conviction and so more than five months have elapsed, at any rate, from the commencement of the offence. The contention advanced for the petitioners is that the complaint

* Cr. R. C. No. 138 of 1945. 27th April, 1945.
(Cr. R. P. No. 132 of 1945).

against them is barred by limitation by virtue of the provisions of section 223 of the Act. There is a proviso to section 223 by virtue of which a different period of limitation is prescribed for complaints based on failure to take out a licence or obtain permission under the Act. Such failure is deemed to be a continuing offence,

"until the expiration of the period, if any, for which the licence or permission is required, and, if no period is specified, complaint may be made at any time within twelve months from the commencement of the offence."

It is argued for the District Board—an argument that was accepted by the Magistrate—as against the contention that the complaint was barred by limitation because it was brought more than three months after the conviction, that the present case falls within the scope of the proviso as an encroachment can be validated with the permission of the District Board. On the basis of this contention, it is argued that, as no period is specified for the permission, it was open to the Board to make the complaint any time within 12 months of the commencement of the offence, that is, the date of the conviction. This contention, in my opinion, has no substance. The petitioners were prosecuted for failing to vacate the property in spite of the fact that a notice under section 164, sub-section (2) of the Act had been served on them. There was no question of a prosecution for failure to obtain permission for the encroachment and indeed it is clear no question of permission for the encroachment has ever arisen.

The other argument advanced as against the contention that the complaint was barred by limitation has more substance. As section 207, sub-section (2), provides that a person who continues in occupation after a conviction based on his failure to vacate in response to a notice to do so shall be punished with fine which may extend to the amount mentioned in the appropriate schedule for each day after the previous date of conviction during which he continues to offend by remaining in possession, the offence committed is a continuing offence; and it is argued that the starting point of limitation will not be the date of the conviction but the last day on which the offence is committed. As against this contention, learned counsel for the petitioners has referred me to a decision of the Bombay High Court in *Bechardas* v. *Emperor*[1]. In that case which was under the Bombay City Municipalities Act, one of the questions that arose was whether the starting point of limitation in respect of a continuing offence was the commencement of the offence or whether a fresh cause of action arose every day. The learned Judges held that the starting point was the commencement of the offence, *i.e.*, when the offence was first committed. The decision seems to have been made, as the judgment of Broomfield, J., shows, not so much on the basis of principle or authority as on grounds of convenience. In the absence of any clear authority it was thought unreasonable for a local body to be permitted to prosecute for failure to remove a building perhaps years after the offence was committed on the ground that the offence was a continuing offence. With respect I am unable to take this view. Section 223 provides that the complaint must be made within three months of the commission of the offence, and if an offence is a continuing offence, the offence goes on being committed every day. Inconveniences may arise, but it is not difficult for the Legis ature to provide against them. In the case cited by Broomfield, J., for instance, *Welsh & Son* v. *West Ham Corporation*[2], it was provided that a penalty should not be incurred after the expiration of one year from the day when the offence was committed or when the law was broken. Moreover in the proviso to section 223 of the Madras Local Boards Act, failure to take out a licence or obtain permission under the Act is deemed to be a continuing offence only until the expiration of the period for which the licence or permission is required so that if a period is specified, a complaint would presumably have to be filed within three months of the date of expiration of the licence or permission. If, on the other hand, no period is specified for the licence or permission it is provided that a complaint may be made at any time within twelve months from the "commencement of the offence."

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1. A.I.R. 1930 Bom. 340.
2. (1900) 1 Q.B. 324.

The limitation of the period for which an offence shall be deemed to continue and the use of the words "from the commencement of the offence" instead of "the commission of the offence." indicate that the starting point of limitation for a continuing offence will be the last date on which the offence is committed unless specific provision is made to a contrary effect.

I agree, therefore, with the view taken by the Magistrate that the complaint is not barred by limitation, although for different reasons. As far as the first accused is concerned, the petition is dismissed, and the Magistrate will dispose of the case against him in accordance with law. In the petition Criminal Revision Case No. 776 of 1944 against the conviction of both the accused in C. C. No. 2027 of 1943 I allowed the petition of the second accused on the ground that she was not in occupation of the property. That being so, the present complaint cannot be maintained as against her. As far as she is concerned her petition is allowed and she is discharged.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Nagammal .. *Appellant**

v.

Subbalakshmi Ammal and others .. *Respondents*,

Hindu Law—Maintenance—Allotment of property for—Nature of estate conveyed—Succession to such property—Possession of third parties on behalf of the widow—If can be adverse to the heirs of the widow.

One *P* a widow was allotted the suit property for her maintenance after the death of her husband, At that time *S*, who was her husband's son by a predeceased wife was a minor. Though the patta to the suit land was transferred in favour of the brother of *P*, the lower Court found disbelieving an oral sale in favour of the brother, that the possession of the brother and after his death, of his widow was not in their own right as vendees from *P* or in any other capacity but only as persons in enjoyment on behalf of *P* who was staying with them after her husband's death.

In a suit by *P's* heirs claiming the property,

Held, that in view of the surrounding circumstances and probabilities, *P* got only a life estate in the property allotted to her. Case-law discussed.

That even if *P* got an absolute estate the plaintiffs being her heirs are entitled to the property in preference to the defendant who is only her brother's widow.

On the finding of the lower Court the possession of the brother and after his death of his widow was not adverse to *P* and therefore to the estate of *S*.

Appeal against the decree of the District Court, South Arcot, in A. S. No. 125 of 1944, preferred against the decree of the Court of the District Munsiff, Tirukoilur, in O. S. No. 384 of 1941.

M. S. Venkatarama Aiyar for Appellant.

R. Desikan and *V. Ramachandran* for Respondents.

The Court delivered the following

JUDGMENT.—The first defendant is the appellant in the second appeal and two questions arise for consideration. The first is whether, in the absence of any proof that Ponnammal, the step-mother of Srinivasan, who was the last maleholder of the estate, was allotted the lands absolutely or only for her life, the District Judge of South Arcot was right in decreeing the plaintiffs' claim on the basis that after Ponnammal's death, which took place in 1941, the lands reverted to the family of Srinivasan.

Mr. M. S. Venkatarama Aiyar, the learned advocate for the appellant, was right in his contention that the rule enunciated by the Privy Council in *Mahomed Shumsool* v. *Shewakram*[1], that in the case of grants to a woman, there is a presumption (based on the notions prevalent in the community to which the grantor and the grantee belong) that the estate conferred upon her is only the limited estate of a

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* S. A. No. 685 of 1945. 23rd August 1946.

1. (1874) L. R. 2 I. A. 7.

Hindu widow or a Hindu daughter and not an absolute estate, has been abrogated by later decisions. According to the law as understood at present, there is no presumption one way or the other, and there is no difference between a gift to a male and a gift to a female. The fact that the donee is a woman does not make the gift any the less absolute where the words would be sufficient to convey an absolute estate to a male. But this position is quite different from what a Court may, and has to, presume from the surrounding circumstances and probabilities as regards the nature of any property which is allotted to a person for maintenance. A maintenance grant is *prima facie* an allotment of a personal nature to the grantee. It can be said that a Court is justified in presuming, that a personal grant of the kind enures only for the lifetime of the grantee until the contrary is established. The presumption here is not based upon the sex of the grantee but depends upon the object, motive, or purpose of the grant. It was this view that was taken by Varadachariar, J., in *Dorayya* v. *Mangamma*[1], and confirmed on appeal *Mangamma* v. *Dorayya*[2]. That a maintenance grant carries with it such a presumption is implicit in the decision in *Nandlal* v. *Sundarlal*[3], following the ruling of the Privy Council in *Rameshar Baksh Singh* v. *Arjun Singh*[4]. In the case before us, Ponnammal was allotted the suit property for her maintenance after the death of her husband, Venkatarama Aiyar. At that time Srinivasan who was her husband's son by a predeceased wife was a minor. He was under an obligation to support the step-mother during her lifetime; and she had a right to be maintained during her lifetime. If then it is stated that, in lieu of her rights to maintenance in the property, the lands in question were allotted to her absolutely, the burden is upon those who assert it. An absolute allotment of a small portion of the property in lieu of maintenance is not unknown to Hindu Law, and though not very common in early days, the idea that a maintenance grant may be in absolute form is recognised in *Ramchandra Naicker* v. *Vijiaraghavalu*[5]. But it is the exception rather than the rule. We have also to remember in this case that the allotment, if any, was made prior to 1883, at a time when the notions prevalent in Hindu society as regards such provisions for maintenance were those indicated by the Privy Council in *Mahomed Shumsool* v. *Shewukram*[6]. There is nothing in this case to indicate what exactly was the nature of the grant in Ponnammal's favour except that she took the lands as and for her maintenance.

Assuming, however, for a moment that she held the lands absolutely, the appellant is face to face with another difficulty of an insuperable nature—which is that the plaintiffs are Ponnammal's heirs and not the first defendant who is Ponnammal's brother's widow. This claim is definitely set up in the plaint. The defendants denied that the plaintiffs were the nearest heirs and they did not admit the relationship alleged to be true. Hence arose the necessity for issue 3 about the correctness of the genealogical tree. Mr. M. S. Venkatarama Aiyar argued that there was no adjudication by the Courts below on this claim. But there was no necessity for any adjudication as the plaintiff's rights to succeed as the heirs of Ponnammal on the basis of the relationship being true are too patent for controversy. The defendants do not say that there are any nearer heirs, nor can they claim that they are the heirs in preference to the plaintiffs.

What remains is the point as to adverse possession. Ponnammal died only in 1941. An allegation on the side of the defendants that she orally sold the properties to the first defendant has been disbelieved. Though the patta was transferred in favour of the first defendant's husband ten years before the date of the alleged sale, it has been found by the District Judge as a fact that possession of the first defendant's husband and by the first defendant after his death was possession, not in their own right as vendees from Ponnammal or in any other capacity, but as

1. (1935) 69 M.L.J. 320.
2. (1936) 71 M.L.J. 688.
3. I.L.R. (1943) All. 892.
4. (1900) L.R. 28 I.A. 1 : I.L.R. 23 All. 194 P.C.
5. (1908) 18 M.L.J. 347 : I.L.R 31 Mad. 349 at 352.
6. (1874) L.R. 2 I.A. 7 (P.C.).

persons in enjoyment on behalf of Ponnammal who was staying with them after her husband's death. It is stated that she admitted in the notice, Ex. D.2, that the possession held by the first defendant's husband was on his own behalf. But it is surely open to the Court to hold that notwithstanding such an admission by Ponnammal, the possession held by them was on her behalf and not adversely to her and, therefore, to the estate of Srinivasan.

The second appeal fails and is dismissed with costs. No leave.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Meenakshi Ammal .. *Appellant**

v.

T. S. Chidambaram Chettiar (died) and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 47—Objection to execution on the ground of lands being inalienable—Maintainability—Duty of executing Court.

In an application in 1943 for sale in execution of a maintenance decree of 1928 it was pleaded in bar of execution that the items sought to be sold were inalienable service inam lands and as such it was not open to the executing Court to entertain an application for their sale in execution.

Held that though the principle is well settled that an executing Court cannot go behind the decree and pass an order in execution which will have the effect of nullifying the decree two well-known exceptions have been engrafted on the general principle, namely, that the executing Court will stay its hands where it is plain on the face of the record, that the alienation is prohibited by statute or that it is opposed to public policy. As it was apparent from the plaint and the judgment in the case that the properties sought to be sold were unenfranchised temple service inam lands and as such inalienable and their sale opposed to public policy, the executing Court was justified in staying its hands and rejecting an application for their sale in execution of the decree.

Neti Anjaneyalu v. *Sri Venugopal Rice Mills Co. Ltd.*, (1922) 42 M.L.J. 477 : I.L.R. 45 Mad. 620 (F.B.) and *Maharajah of Vizianagaram* v. *Dantivada Chelliah*, (1904) 14 M.L.J. 468 : I.L.R. 28 Mad. 84 and *Rajah of Kalahasti* v. *Venkatadri Rao Garu*, (1927) 53 M.L.J. 533 : I.L.R. 50 Mad. 897, followed.

Ranga Aiyar v. *Sundararaja Aiyangar*, (1933) 37 L.W. 358 nd *Annamalai Chettiar* v. *Srirangachariar*, (1936) 71 M.L.J. 867 : I.L.R. (1937) Mad. 329, explained.

Appeal against the order of the Court of the Principal Subordinate Judge of Madura, dated 21st December, 1944, and made in E. P. No. 33 of 1944 in O. S. No. 96 of 1926.

V. Ramaswami Aiyar for Appellant.

M. Sundaram for Respondent.

The Court delivered the following

JUDGMENT.—This appeal is against the order of the Subordinate Judge of Madura in E. P. No. 33 of 1944, in O. S. No. 96 of 1926, on his file. The application was for the sale of the share of the deceased first defendant in items 2, 3 and 5 of A schedule property in realisation of the decree amount. This petition was dismissed chiefly on the grounds that the plaintiff's application with regard to these items was barred under section 48 of the Code of Civil Procedure, that items 2, 3 and 5 are inalienable service inam land and their sales are opposed to public policy and that it was not open to the executing Court to entertain an application for their sale in execution.

Mr. Ramaswami Aiyar argued before me that both these conclusions were wrong. It will be convenient to deal with the second point first. The principle is undoubtedly well settled that an executing Court cannot go behind the decree and pass an order in execution which will have the effect of nullifying the decree.

* A. A. O. No. 333 of 1945. 6th September 1946.

To this general principle two-well known exceptions have been engrafted, namely, that the executing Court will stay its hands where it is plain on the face of the record that the alienation is prohibited by statute or that it is opposed to public policy. In the present case it is contended that items 2, 3 and 5 being unenfranchised service inam lands are inalienable and that their sale in execution should not be permitted by the executing Court in pursuance of the principle mentioned above. The answer to this contention is that it is not apparent on the face of the record that items 2, 3 and 5 are temple service inam lands. This does not seem to be correct. In the plaint itself the plaintiff who is the appellant here contended that these items were unenfranchised service inam lands and that in consequence their alienation was opposed to law and custom and the alienations of those items were void. In the judgment given in the suit, O. S. No. 96 of 1926, this contention has been set out in paragraph 2. It no doubt suited the appellant's purpose in the execution petition to go back upon this admission and to seek the sale of those lands; but it is not even now pretended that these are not service inam lands and that they were granted personally as absolute estate. This is therefore a case where on the face of the record, it does appear that items 2, 3 and 5 are unenfranchised temple service inam lands and as such by reason of the decision of the Full Bench in *Anjaneyalu* v. *Sri Venugopala Rice Mill, Ltd.*[1], and a number of other cases that have followed that decision, it must be held that the land is inalienable and its sale is opposed to public policy. Reference was made to two decisions of this Court, one decided by a single Judge Pakenham Walsh, J., in *Ranga Aiyar* v. *Sundararaja Aiyangar*[2] and the other decided by a Division Bench in *Annamalai Chettiar* v. *Srirangachariar*,[3]. In *Raja of Vizianagaram* v. *Dantivada Chelliah*[4] and *Raja of Kalahasti* v. *Venkatadri Rao*[5], it has been held that where the nature of the property is known and the property is inalienable, the executing Court must stay its hands. These decisions are referred to in the cases cited by Mr. Ramaswami Aiyar, but in both those cases it must be noted that the nature of property itself was in dispute. In the case in *Ranga Aiyar* v. *Sundararaja Aiyangar*[2] the dispute as to the nature of the property was raised at the execution stage and evidence was gone into, the executing Court reaching one conclusion and the appellate Court reaching a contrary conclusion. When the matter eventually came before this Court, it was pointed out that it was obvious that the very nature of the property was in dispute and in such circumstances the executing Court could take upon itself the function of deciding that issue, after a decree had been passed. That decision to my mind does not in any manner detract from the principle laid down in *Rajah of Vizianagaram* v. *Dantivada Chelliah*[4] and *Raja of Kalahasti* v. *Venkatadri Rao*[5], that where it appears from the face of the record that the property in question is not alienable, the executing Court will not proceed to direct its sale. In the Division Bench case *Annamalai Chettiar* v. *Srirangachariar*[3]. the facts are more or less the same as in *Ranga Aiyar* v. *Sundararaja Aiyagnar*[2]; there also the nature of the property was not known and it was held that the executing Court could not go into that question. In the present case, as I have already stated, the plaint as well as the judgment make it clear that items 2, 3 and 5 are properties whose alienations are opposed to public policy and with that knowledge I am convinced that the executing Court was right in staying its hands and not directing the sale of those properties in execution.

In view of this finding, it is not necessary for me to go elaborately into the first point that has been argued before me, namely, that section 4F of the Code of Civil Procedure does not operate with regard to item 2. Here the decree was passed on 23rd November, 1928, and the execution application was filed on 27th September, 1943, more than twelve years after the date of the decree. It is admitted that so far as items 3 and 5 are concerned, they are barred under section 48 except with regard to future maintenance. The only item with regard to which this question

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1. (1922) 42 M.L.J. 477 : I.L.R. 45 Mad. 620 (F.B.).
2. (1933) 37 L.W. 358.
3. (1936) 71 M.L.J. 867 : I.L.R. (1937) Mad. 329.
4. (1904) 14 M.L.J. 468 : I.L.R. 28 Mad. 84.
5. (1927) 53 M.L.J. 583 : I.L.R. 50 Mad. 897.

arises is the second item. That item was subject to a lease which expired in 1939. The lease was in favour of the eighth defendant. The decree directed that the claim could be enforced against that item only after the expiry of the said lease. The contention therefore with regard to the second item is that the enforceability of the decree against that item arose only after 1939 and that the twelve years' period is available from after that date. Even with regard to this item it is plain that it cannot be sold in execution of the decree by reason of the finding that I have now come to on the footing that it is temple service inam land. No doubt, it is open to the maintenance holder to enforce the decree against this item in any other way that may be open to her under the law except by sale of the land. That right will be reserved to her subject to the respondent's contention based on Article 182 (5) of the Limitation Act.

The appeal is dismissed with costs.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Vellai Goundan *alias* Manisami Goundan and others .. *Appellants**

v.

Manian Rajagopal Mudaliar. .. *Respondent.*

Mortgage—Execution by Hindu father—Suit against father and sons—Consideration—Proof of—Onus.

In a suit against a Hindu father and his two sons for recovery of money due on a mortgage bond for Rs. 400 executed by the father in favour of the plaintiff, the trial Court found that the mortgage was supported by consideration only to the extent of Rs. 75 and gave a decree for that amount. But the appellate Court held that the burden was on the defendants to prove that the consideration as stated in the deed did not pass and not for the plaintiff to prove affirmatively the passing of the consideration and on that ground decreed the suit as prayed for. On appeal,

Held, that it was wrong to take the decision of the Privy Council in *Bhagwan Singh* v. *Bishambar Nath*[1] as one of universal application on the question of burden of proof with regard to all documents irrespective of the facts of the case and to base a finding and a decision on it. In the circumstances, though the burden of proof was upon the 1st defendant, he being the executant of the mortgage, to show that the consideration did not pass to him as recited in the document and it was not for the plaintiff to show that the consideration passed in any other way than that recited in the document, yet as regards the 2nd defendant who was not a party to the document the burden will lie on the plaintiff to prove the passing of consideration. As regards the 3rd defendant, who was not born on the date of the execution of the mortgage bond, his case stood on a different footing.

Appeal against the decree of the District Court of North Arcot at Vellore in A. S. No. 148 of 1944, preferred against the decree of the Court of the District Munsiff of Arni in O. S. No. 138 of 1943.

T. L. Venkatarama Aiyar for Appellants.

G. R. Jagadisan for Respondent.

The Court delivered the following

JUDGMENT.—The defendants are the appellants and the appeal arises out of a suit for recovery of money due on a mortgage bond for Rs. 400 executed on 5th February, 1931, by the first defendant, the father of defendants 2 and 3, in favour of the plaintiff. The trial Court found that the mortgage bond was supported by consideration to the extent of Rs. 75 only and gave a decree for that amount and interest thereon. On appeal by the plaintiffs, the learned District Judge of North Arcot at Vellore holding that the burden of proof was on the defendants following the observations of the Privy Council in *Bhagwan Singh* v. *Bishambar Nath*[1], held that it is not for the plaintiff to prove affirmatively the passing of the consideration and decreed the suit as prayed for. Hence this second appeal.

It is true in this case evidence was let in by both parties examining a witness each and the case could have been disposed of on that evidence without adverting to the burden of proof. As a matter of fact the trial Court framed the issues as if

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* S. A. No. 1414 of 1945. 6th August, 1946.

1. (1940) 2 M.L.J. 452: I.L.R. 1940 Mad. 267 (P.C.).

the burden was on the defendants and evidence was let in on the basis that the burden was on the defendants. So the learned District Judge could have easily disposed of the case on the evidence on record and come to a conclusion with regard to the facts of the case but instead of doing so, he emphasised the fact that the burden was on the defendants stating that "it was really unnecessary for the plaintiff to have called any evidence on the issue as to consideration, since the burden of proof was entirely on the defendants." Since the judgment of the learned Judge is based on this observation of his, it is necessary to consider how far he was justified in coming to that conclusion. The document was executed only by the first defendant. Neither the second defendant nor the third defendant were parties to that document. It is stated by learned Counsel for the respondent-plaintiff that the third defendant was not born on that date. But the second defendant was born on that date and so far as he is concerned, the burden will be upon the plaintiff to prove the passing of consideration. The headnote in *Bhagwan Singh* v. *Bishambar Nath*[1] is rather too wide. In that case the consideration for the mortgage bond on which the suit was filed was made up of three items : payment in cash before the Sub-Registrar, the return of two documents and also payment of money in two banks. But it was pleaded that the money paid was taken back. That was the plea of the defendants. Consequently the burden was upon the defendants to prove, on account of the particular facts of that case, that the entire consideration did not pass. That case had to be considered by two Judges of this Court, Abdur Rahman, J., and Somayya, J., by the latter in *Muthachi* v. *Kandasami Muthirian*[2] and by the former in *Sreeramulu* v. *Thandavakrishnayya*[3]. The facts of the Privy Council case are fully stated by Somayya, J., and as he has written an exhaustive judgment pointing out all the circumstances which led the Privy Council in that particular case to come to the decision at which it arrived, I entirely agree with him. It is unnecessary to repeat the observations of Somayya, J. Agreeing with him I should think the learned District Judge was wrong in having taken the decision of the Privy Council in *Bhagwan Singh* v. *Bishambar Nath*[1], as one of universal application on the question of burden of proof with regard to all documents irrespective of the facts of the case and basing that finding on that opinion of his. I therefore set aside the decree of the lower appellate Court and remand the appeal for being reconsidered in the light of the observations made above holding that so far as the second defendant is concerned, he being not a party to the document the burden is on the plaintiff to prove consideration. Of course it will be open to the plaintiff to urge in the lower appellate Court that so far as the third defendant is concerned he was born subsequently and therefore stands on a different footing. It is unnecessary to consider at this stage that aspect of the case. So far as the first defendant is concerned, the burden is upon him, being the executant of the mortgage deed, to show that the consideration did not pass as recited in the document. It is not for the plaintiff to show that the consideration passed in any other way than that recited in the document.

The decree of the lower appellate Court is set aside and the appeal is remanded to the lower Appellate Court for being disposed of in the light of the observations made herein. The costs of this second appeal will abide and follow the final result of the appeal. The Court-fee paid on the memorandum of second appeal will be refunded to the appellants.

K.C. *Appeal allowed and case remanded.*

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1. (1940) 2 M.L.J. 452 : I.L.R. (1940) Mad. 267 (P.C.).
2. (1945) 1 M.L.J. 207.
3. (1942) 2 M.L.J. 452.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Mohamed Rahimullah and another .. *Parties* in M. P. No. 332 of 1946, Chief Presidency Magistrate's Court, Egmore, Madras.*

Criminal Procedure Code (V of 1898 as amended), sections 488, 489 and 490—Mahomedan wife—Divorce by husband—Payment of Iddat maintenance—Order regarding maintenance—Husband whether bound to pay after divorce—Power of Court to modify order regarding maintenance.

When a valid and irrevocable divorce has been given by a Mahomedan husband to his wife in conformity with the Mahomedan law and he has also paid the Iddat maintenance, he is not bound to pay the maintenance awarded to his divorced wife under section 488, Criminal Procedure Code, after the marriage has ceased to subsist between them. In such a case the Magistrate is not only bound to refuse to enforce the maintenance order under section 490 of the Criminal Procedure Code, but is also empowered under section 489 of the Code to alter the amount payable under it to nothing, that is to say, by a combined effect of those provisions he is competent to set aside the order for maintenance.

Case-law reviewed.

Case referred for the orders of the High Court under section 432 of the Code of Criminal Procedure by the Chief Presidency Magistrate, Egmore, Madras, in his letter dated 3rd July, 1946.

A. Kirmani for 1st Respondent.

P. Pocker (Amicus Curiae) for 2nd Respondent.

The Court made the following

ORDER.—This is a reference by the Chief Presidency Magistrate, under section 432 of the Code of Criminal Procedure, made in the following circumstances. Kurshid Begum filed an application under section 488 of the Code of Criminal Procedure against her husband Mohamed Rahimulla for maintenance in M. P. No. 221 of 1945. Maintenance was awarded. On 5th January, 1946, Mohamed Rahimulla filed M. P. No. 6 of 1946, alleging that he had divorced his wife and praying for the cancellation of the order of maintenance made in M. P. No. 221 of 1945, on the ground that she had ceased to be his wife. As it was admitted by Mohamed Rahimulla before the Court that he had not paid the amount of maintenance for the period of Iddat, his application for the cancellation of the order of maintenance was rejected. Against the order of rejection Mohamed Rahimullah filed Crl. R. P. No. 193 of 1946 (Crl. R. C. No. 199 of 1946) in this Court which was dismissed by Kuppuswami Ayyar, J. In dismissing the application the learned Judge followed the decision of this Court in *Muhammad Anser Sahib* v. *Zubeida Bee*[1], where it was laid down that divorce effects not a change in circumstances but a change in the status. After dismissal of the Criminal Revision Petition here, Mohamed Rahimulla paid Kurshid Begum the amount of maintenance for the period of Iddat and communicated to her in writing the fact of his having divorced her irrevocably in conformity with the requirements of the Mahomedan law. Based upon these averments, he filed a fresh application M. P. No. 332 of 1946 in the Court of the Chief Presidency Magistrate, contending that the divorce had become irrevocable, that Kurshid Begum had ceased to be his wife and that therefore the order of maintenance passed in M. P. No. 221 of 1945 should be cancelled. The learned Chief Presidency Magistrate in dealing with this application felt confronted with a difficulty arising out of the order of this Court in the Criminal Revision Petition. Rahimullah had, according to his averments, absolutely divorced his wife, so that the relationship of husband and wife between them had ceased effectively. He had paid the maintenance for the period of Iddat and had conformed to all the requirements of the personal law applicable to the parties and had also duly communicated the fact of the divorce to his wife. But the order of this Court in Crl. R. C. No. 199 of 1946 decided by Kuppuswami Ayyar, J., had, according to the Magistrate, indicated that it was not a case in which the

* Cr. R. C. No. 595 of 1946. 15th November, 1946.
(Case Referred No. 25 of 1946).

1. (1933) M.W.N. Crl. 121.

Magistrate could pass an order of cancellation under section 488 of the Code of Criminal Procedure, since the divorce had not effected a change in the circumstances within the meaning of section 489. The Chief Presidency Magistrate has therefore referred to this Court the question of law arising in the matter with particular reference to the ruling given in the Criminal Revision Petition. As Kurshid Begum was not represented, I appointed Mr. B. Pocker as *amicus curiae* and he has given me valuable assistance.

It is assumed for the purpose of this reference that there is a valid and irrevocable divorce in force between the parties which has been communicated to the wife in the manner required under the law and that the maintenance for the period of Iddat after the date of the divorce was duly paid. These are facts which the Magistrate will have to find upon the evidence before giving effect to the decision on the question of law raised by him.

The question that arises for consideration is whether when a valid and irrevocable divorce has been given by a Mahomedan husband to his wife in conformity with the Mahomedan law and he has also paid the Iddat maintenance, he is still bound to continue to pay the maintenance awarded to his wife under section 488 of the Code of Criminal Procedure when the marriage is not subsisting between them; in other words when the marital tie has been completely and effectively severed, whether the divorced wife can still claim maintenance on the ground that the divorce does not operate as a change in circumstances within the meaning of section 489 but is in the nature of a change in status.

The answer to this question is straight and simple. The foundation upon which section 488 and section 489 of the Criminal Procedure Code rest, so far as granting of maintenance by the husband to the wife is concerned, is that the relationship of husband and wife subsists between them. When that relationship is lawfully dissolved and there is no marital tie whatsoever subsisting in fact or in law between them, it is hard to see either in reason or upon any canon of justice or even upon the language of sections 488 and 489 how the husband can be directed to continue to maintain his divorced wife.

The proposition that an allowance ordered to be paid by a man to his wife for the sole reason that she is his wife ceased to be payable when she ceases to be his wife whether by death or divorce is, as remarked by the Nagpur High Court in a decision that I shall presently refer to, not even open to discussion. In regard to that position all the High Courts in India are agreed, the only dissentient being Knox, J., who was in a minority in the Full Bench ruling of the Allahabad High Court in *Shah Abu Ilyas* v. *Ulfat Bibi*[1]. The further proposition that the allowance given to a wife should continue to be paid until the termination of Iddat is included in the proposition that it ceases on her divorce. It is no more than saying that it ceases when the divorce is complete and not before. The only doubt that was raised at one time in the Allahabad High Court was whether the allowance having been one granted under section 488 of the Criminal Procedure Code by the Magistrate, he could make any change in it either by way of increasing or decreasing it or discontinuing it except under the condition mentioned either in sub-sections (4) and (5) of section 488 or in section 489. In sub-section (4) a wife is not entitled to receive an allowance from her husband if she is living in adultery, or if without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent. Under sub-section (5) if it is proved by the husband after such an order has been passed that she is living in adultery or that without sufficient reason she refuses to live with him or that they are living separately by mutual consent, the Magistrate shall cancel the order. None of these provisions applies to the present case. Section 489 provides that on proof of a change in the circumstances of any person receiving under section 488 a monthly allowance or of any person ordered to pay the allowance to his wife the Magistrate may make such

1. (1896) I.L.R. 19 All. 50 (F.B.).

alteration in it as he thinks fit subject to the provision that if he increases the allowance it should not exceed the maximum of Rs. 100 a month. We are not concerned with sub-section (2) of that section. Section 490 is the provision for the enforcement of the order of maintenance. In In the matter of the Petition of *Din Muhammad*[1], Mahmood, J., while construing the provisions in the then Code corresponding to the present section 489 held that the alteration in the allowance contemplated therein only refers to a power to alter the amount and not to a total discontinuance thereof. In taking this view, the learned Judge was following the ruling in *Abdur Rahaman* v. *Sakhina*[2], which was a decision under the Presidency Magistrate's Act of Bengal. The learned Judge, however, for other reasons that I shall presently describe held that in the case of a divorce by a Mahomedan husband of his wife, the Magistrate may refuse to enforce the order under section 490. The view of Mahmood, J., was followed by a Full Bench of the same High Court in *Shah Abu Ilyas* v. *Ulfat Bibi*[3], where Aikman, J., who delivered the leading judgment, adopted the reasoning of Mahmood, J., and said :

> "The 'change in circumstances' referred to in section 489 is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed, and not a change in the status of the parties which would entail the stoppage of the allowance."

These dicta would appear to be the basis of the two decisions of Burn, J., in *Muhammad Anser Sahib* v. *Zubaida Bee*[4] and of Kuppuswami Ayyar, J., in *Mohamed Rahimulla* v. *Khurshid Begum*[5]. It might however be noted that this restricted view of the interpretation of the expression "change in the circumstances" in section 489 has not been adopted in any other Court. The entire position has been exhaustively reviewed by Halifax, A.J.C., in *Emperor* v. *Shaikh Daud*[6], where the learned Judge after referring to the decision of the High Court of Calcutta in *Nepoor Aurut* v. *Jurai*[7] and of the Chief Court of the Punjab in *Mt. Baji* v. *Nawab Khan*[8] pointed out that there was no valid ground whatever for excluding legal or personal status from the circumstances in which a change would make section 489 applicable and for including in them practically nothing but pecuniary circumstances as was done by the Allahabad High Court. The only reason advanced by Mahmood, J., in In the matter of the Petition of *Din Muhammad*[1] was that the expression "change in the circumstances" was preceded by the word "wife" and followed by a limitation as to the amount of the monthly allowance and hence it indicated that it excluded the idea of total discontinuance of the allowance. The learned Judge of the Nagpur High Court commented on that reasoning in the following terms :

> "I am unable in the first place to see what the position of the words 'wife or child' has to do with the question. They are merely a part of the description of one of the two classes of persons in whose circumstances a change would empower the Magistrate to make an alteration in the allowance. They are indeed otiose and might easily have been omitted. As to the limitation of the amount, that is merely a maximum, and to say that because of that limitation the alteration could not be to nothing would be to say that because of the same limitation in section 488 the Magistrate could not refuse to give an allowance on proof that the applicant was not the wife or child of the non-applicant."

He observed that a valid divorce is such a change in the circumstances as is contemplated by section 489, and that the alteration in the amount of the order could be a reduction of it to nothing and that is a necessary consequence of the view taken that a wife ceases entirely to be entitled to an allowance previously ordered when she is completely and validly divorced. The judgment concludes with this observation :

> "I hold therefore that when a wife, whose husband has been ordered to pay her an allowance under section 488, Criminal Procedure Code, is proved to have been completely and validly divorced a Magistrate is not only bound to refuse to enforce the order under section 490 but is also empowered to alter the amount payable under it to nothing under section 489, that is to say, he can set aside the order."

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1. (1882) I.L.R. 5 All. 226.
2. (1879) I.L.R. 5 Cal. 558.
3. (1896) I.L.R. 19 All. 50 (F.B.).
4. (1933) M.W.N. Crl. 121.
5. Crl. R.C. No. 199 of 1946.
6. A.I.R. 1921 Nag. 7.
7. (1873) 19 W.R. 73.
8. (1894) 21 P.R. Crl. 1894.

With this conclusion and with the reasoning of the learned Judge I am, with respect, in entire agreement.

Apart however from the interpretation of the expression " change in the circumstances " in section 489, all Courts including the Allahabad High Court have taken uniformly the view that if the conjugal tie is proved to have been severed, barring the liability to pay maintenance during the period of Iddat, the wife ceases to have any right to enforce against the husband any order for maintenance made in her favour under section 488. In the case already cited, In the matter of the Petition of *Din Muhammad*[1], Mahmood, J., quoted the observations in *Abdur Rahman* v. *Sakhina*[2] to the following effect:

> "It is as essential to the continued operation, as to the original making of an order of maintenance, that the recipient of the allowance should be a wife at the time for which maintenance is claimed."

If the plea of divorce is raised before him by the husband, the Magistrate must determine on such evidence as may be before him whether there has or has not been a legally valid divorce.

> "If he finds that there has been a valid dissolution of the marriage tie, he should refrain from taking any steps to enforce the order of maintenance from the date of such dissolution."

The *ratio decidendi* will be found in the following passage:

> "The whole of Chapter XLI of the Criminal Procedure Code so far as it relates to the maintenance of wives, contemplates the existence of the conjugal relation as a condition precedent to an order of maintenance and, on general principles, it follows that as soon as the conjugal relation ceases, the order of maintenance must also cease to have any enforceable effect. When and in what manner a cessation of the conjugal relation takes place is a question which, *ex necessitate rei*, must be determined according to the personal law to which the parties concerned are subject . . . . .
>
> All that the Magistrate has to determine in a case of this kind is, whether the woman claiming maintenance is still the wife of the person against whom she advances such a claim. If the question is determined in the affirmative, the order of maintenance must continue to be operative. On the other hand, if it is found that by the effect of some rule of the personal law of the parties concerned, the conjugal relation has absolutely ceased to exist, the order of maintenance, *ipso facto* becomes *functus officio* and can no longer be enforced."

Knox, J., in *Mahabiran* v. *Fakir Baksh*[3], had dissented from this view. But it is unnecessary to discuss that ruling because of its having been overruled by a Full Bench of that Court in *Shah Abu Ilyas* v. *Ulfat Bibi*[4] to which Knox, J., who dissented from the majority view, was a party. The majority decision was in conformity with the dicta of Mahmood, J., just referred to. The judgment of the majority was that when a plea of divorce is put forward the Magistrate is not only competent, but it is his imperative duty, to inquire into the plea, and determine on such evidence as may be adduced before him whether the relation of husband and wife subsists between the person against whom an order is asked for and the person making the application. All the previous cases bearing upon the question were fully reviewed and overruling *Mahabiran* v. *Fakir Baksh*[3], Aikman, J., pointed out that the view of Knox, J., was opposed not only to the decision of the Allahabad High Court, but to the decisions of the Calcutta, Bombay and Madras High Courts and the Chief Court of the Punjab and had not been adopted by any authority save Knox, J., himself. Aikman, J., said:

> "It has been repeatedly held that the Legislature in enacting section 488 of the Criminal Procedure Code did not intend to interfere with the right of divorce.
>
> "It cannot, in my opinion, be disputed that it is only on proof of the existence of conjugal relations between a man and a woman that the man can under section 488 be ordered to provide for the woman's support and I hold that it is only on the supposition of the continued existence of that relationship that the allowance can continue."

In another place it was pointed out that under section 490 of the Code of Criminal Procedure the question for the Magistrate to consider is not merely whether he has jurisdiction over the person affected by the order, and whether he is satisfied as to the identity of the parties. It was observed:

1. (1882) I.L.R. 5 All. 226.
2. (1879) I.L.R. 5 Cal. 558.
3. (1893) I.L.R. 15 All. 143.
4. (1896) I.L.R. 19 All. 50 (F.B.).

"A most material question which in my opinion it is incumbent on him to consider is whether the order to which it is sought to give effect is still in force, or whether it has become '*functus officio*'."

This view has been taken in a long line of cases *Abdur Rahman* v. *Sakhina*[1], In the matter of the Petition of *Din Muhammad*[2], In re *Kasam Pirbhai*[3], In re *Abdul Ali Ismailji*[4], *Mahomed Abid Ali Kumar Kadar* v. *Luddan Sahiba*[5] and a number of cases of the Punjab High Court as also in the latest decision of the Calcutta High Court in *Ahmad Kasim Molla* v. *Khatun Bibi*[6].

That this principle is of still wider application and the doctrine, that when the basic relationship of husband and wife terminates in any lawful manner the Magistrate has not only the power under the Code of Criminal Procedure to alter the amount but to cancel the order of maintenance made by him is also applicable to the case of Hindus has been held by Krishnan, J., in *Meenatchi Ammal* v. *Karuppanna Pillai*[7]. The learned Judge said :

"It was contended that under section 489, the Magistrate could not altogether cancel the order of maintenance but could only alter it or reduce it. I do not think the word 'alter' is used in any such restricted meaning. The reduction of the maintenance to nothing would also come within the meaning of the word 'alteration'."

It only remains now to examine the two decisions of Burn, J., and Kuppuswami Ayyar, J., adverted to in the reference by the Chief Presidency Magistrate. With regard to the ruling of Burn, J., it will have to be remembered that the question that arose in that case was whether during the period of Iddat the maintenance could be enhanced as was done by the Magistrate, and since for the purpose of such enhancement a divorce cannot be deemed to be a change in the circumstances, the learned Judge held that the order of the Presidency Magistrate was without jurisdiction and set it aside. The point to be noted is that the order granting enhancement of the maintenance was set aside and the wife's petition was rejected. With reference to the second decision again, the circumstances were at that stage somewhat different. Divorce had not been satisfactorily proved and admittedly maintenance for the period of Iddat had not been paid. The particular question whether by reason of any irrevocable divorce the order made under section 488 should stand vacated on account of cessation of the marital tie was not in question in the petition as it has been directly raised in this proceeding.

I may incidentally refer to a recent ruling of Kuppuswami Aiyar, J., in *Abdul Khader* v. *Azeeza Bee*[8], where under identical circumstances the learned Judge held that the wife will not be entitled to maintenance after the date when the factum of her having been divorced was duly communicated to her. He said :

"Whatever it be, there is the definite admission of P. W. 1 that she (the wife) came to know of the thalaknama from the Sub-Inspector before she was examined, which was on 5th May, 1943. So at any rate from the date on which the Sub-Inspector informed her the divorce had come into effect. The wife will therefore not be entitled to maintenance at any rate after 5th May, 1943, as she came to know of the thalak before that date."

I hold, therefore, in agreement with the view expressed by the Nagpur High Court in the case cited above, which is the view consistently obtaining in all the Courts, that in circumstances such as those which are assumed to exist in the present case the Magistrate is not only bound to refuse to enforce the order under section 490 of the Code of Criminal Procedure but is also empowered under section 489 of the Code of Criminal Procedure to alter the amount payable under it to nothing, that is to say, by a combined effect of both these provisions he is competent to set aside the order. The records in the case will be returned to the Magistrate with a copy of this order.

B.V.V. ——— *Reference answered.*

1. (1879) I.L.R. 5 Cal. 558.
2. (1882) I.L.R. 5 All. 226.
3. (1871) 8 Bom.H.C.R. 95.
4. (1882) I.L.R. 7 Bom. 180.
5. (1886) I.L.R. 14 Cal. 276.
6. (1931) I.L.R. 59 Cal. 833.
7. (1924) 48 M.L.J. 183 : I.L.R. 48 Mad. 503.
8. (1944) 1 M.L.J. 17.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
(Ordinary Original Civil Jurisdiction.)
PRESENT :—MR. JUSTICE CLARK.

In the matter of The Indian Companies Act (VII of 1913) and *In the matter of* The Sri Krishna Jute Mills, Ltd., Ellore.

Mylavarapu Ramakrishna Rao, Secretary and Treasurer of the above Mills .. *Applicant**

v.

Mothey Krishna Rao .. *Respondent.*

Companies Act (VII of 1913), sections 3, 82 and 87 and Company Rules, rule 9—Application to enforce a right not provided in the Act—Maintainability—Inherent jurisdiction of Company Court to grant relief—Company Court, if has exclusive jurisdiction in all such matters.

The applicant, alleging himself to be the newly elected Secretary and Treasurer of a Company applied to the Company Judge of the High Court to direct the ex-secretary to deliver possession of the properties of the Company to him and to restrain the ex-secretary by an injunction from proceeding with a suit in the District Munsiff's Court, Ellore, challenging the validity of the election of the applicant. On an objection to the maintainability of such an application,

Held, that there was no provision in the Companies Act conferring any special rights in a Secretary in regard to the possession of the property of the Company, and as the inherent jurisdiction of the Court could be invoked only to enforce compliance of special statutory obligations, the application was not maintainable. *British India Corporation, Ltd.* v. *Robert Menzies*, (1936) I.L.R. 58 All. 988, referred to.

Held further, that there is no provision in the Companies Act which gives the Company Court exclusive jurisdiction in all Company matters. In fact many of the special remedies provided by the Act are equally enforceable in the other Courts by suits.

British India Corporation, Ltd. v. *Robert Menzies*, (1936) I.L.R. 58 All. 988, dissented from on this point.

D. Narasaraju for Applicant.

V. K. Thiruvenkatachari for *P. V. Subramaniam* for Respondent.

The Court delivered the following

JUDGMENT.—The applicant claims to be the Secretary and Treasurer of Sri Krishna Jute Mills, Ltd., Ellore. He is admittedly a shareholder in that Company, as also is the respondent. The respondent was admittedly the Secretary and Treasurer of the Company until the 16th April, 1945. He claims still to be the Secretary and Treasurer, but the applicant claims that he has a better right to those offices and that would appear to be the real substance of the dispute between these two gentlemen. It is common ground that the Secretary and Treasurer of this Company is also a director of the Company *ex-officio*.

The applicant's grievance arises in the following circumstances :—He claims that a requisition signed by 110 shareholders including himself for the holding of an extraordinary general meeting of the Company to consider certain proposals was disregarded by the Directors of the Company. That requisition is stated to have been deposited in the office of the Company on the 20th January, 1945, and, according to the applicant, it was the respondent as the Secretary and Treasurer of the Company, who was responsible for the decision to disregard that requisition. I understand that the proposals, which the requisitionists desired to have considered, were, *inter alia*, concerned with a change in the incumbent of the post of Secretary and Treasurer. Also, I understand, that the proposals concerned a change in the personnel of the Board of Directors.

As the requisition for an extraordinary general meeting to consider these proposals was disregarded, it is said that the requisitionists decided to hold the meeting on their own. The applicant claims that they gave sufficient notice to all the shareholders of the Company, and that the meeting duly took place on 16th April, 1945. That meeting, it is said, had to be arranged outside the Company's premises on account of the alleged refusal of the respondent to permit the meeting

* Application No. 1146 of 1946. 7th August, 1946.

to be held there. It is said that the respondent also refused to hand over the minute books, etc., of the Company for use at that meeting.

According to the applicant, resolutions were passed at that meeting removing the Board of Directors and appointing a fresh Board and replacing the respondent as Secretary and Treasurer by the applicant. The applicant states that the copies of these resolutions were "duly communicated" to the Assistant Registrar of the Joint Stock Companies, West Godavary—Kistna under section 82 of the Act. It is said that before accepting these resolutions that official either on his own initiative, or after consultation with the Registrar of Joint Stock Companies held an enquiry and thereupon recorded the resolutions. I mention this factor as considerable reliance has been placed on behalf of the applicant on the acceptance of those resolutions by that Official.

Matters seem to have been at an impasse and before the meeting of 16th April, 1945, took place the respondent filed a suit in the Court of the District Munsiff, Ellore, for a declaration that the proposed meeting would be invalid and for an injunction restraining the applicant and the other requisitionists from holding it. An attempt was made to secure an interim injunction to prevent the holding of the meeting, but that failed. After the meeting had been held with the results, which I have referred to, the next step was the filing by the applicant of a complaint under section 282-A of the Act against the respondent in respect of the alleged wrongful withholding of the property of the Company, *viz.*, the minute book, etc. An application in revision was filed in this Court to stay those proceedings pending the disposal of the civil case in the District Munsiff's Court and the hearing of that application has, I understand, been postponed until the present application is disposed of.

The applicant now prays for a direction to the respondent to hand over to him the records, account books, pass books, keys, etc., and for an injunction restraining the respondent from proceeding with his suit in the District Munsiff's Court, Ellore. The first objection by the respondent to this application is that this Court has no jurisdiction to hear it, and I have heard arguments on that contention as a preliminary point.

The petition is described on the face of it as being filed under sections 3, 82, and 87 of the Act and rule 9 of the Rules framed under the Act. I invited the counsel for the applicant to state under which of these provisions he claimed there was a substantive right to file such a petition, but he frankly admitted that there is no specific provision in the Act, which enables such a petition to be filed. Section 3 is of course a jurisdiction section. Section 82 is the section dealing with the requirements of registration of copies of special and extraordinary resolutions and section 87 imposes a responsibility on the officers of the Company to keep at the registered office of the Company a register of the Directors, Managers, and Managing Agents, etc. Rule 9, of course, is a procedural provision governing the form, which applications under the Act are to take in this Court. It is clear that none of these provisions can be relied on as justifying the hearing of the present application. Counsel for the applicant meets this difficulty by relying on what he describes as the inherent jurisdiction of the Court to give effect to, or to enforce compliance with the provisions of the Act. I am by no means clear as to what specific provision of the Act he relies on as imposing the liabilities which he now claims to enforce. S. 82 provides that a copy of every special and extraordinary resolution shall be filed with the Registrar and that he shall record the same Taking the pleas in the application at their face value—as I must regard them for the purpose of hearing this demurrer—it appears that the Registrar of the Joint Stock Companies has accepted and filed the copies of the resolutions. That being so, I cannot see that there is anything more required to be done on that account, certainly not at the instance of this applicant. It may be that the continuance in office of the respondent and his co-directors notwithstanding the decision of the Company at the requisitionists' meeting would amount to a contravention of section 87, and if so the question is who would be entitled to move the Court to consider the regularity

or otherwise of the position. Possibly the Company itself or a shareholder representing all the other shareholders, or a majority of them could apply, but I am very doubtful whether one shareholder could properly complain in respect of such a matter.

For the purpose of disposing of this matter, however, I will assume that no objection can be taken to the application on the ground that it is the application of only one shareholder of the company. I will assume further that the applicant may be regarded as being entitled to do whatever the company itself could do in the way of making such an application. It will of course be appreciated that these are only assumptions and that I am not finding that he is so entitled. The only authority which the applicant relies on in support of his proposition that the Court in the exercise of the company jurisdiction has inherent jurisdiction to give effect to, or enforce compliance with all the provisions of the Act is *British India Corporation, Ltd.* v. *Robert Menzies*[1]. The facts in that case were as follows :—Mr. Menzies was a shareholder in the British India Corporation, Ltd., and was its Secretary and also Managing Director. Whilst he was away on leave, his services were dispensed with and on his return he applied to the company for a copy of the register of its members. That copy was not supplied and Mr. Menzies filed an application to the Company Court, in that case the District Court of Cawnpore, praying that the Company may be ordered to supply him a copy of the names and addresses of the shareholders. The District Judge granted the petition and the matter came on revision before a bench of the Allahabad High Court. Sub-section (1) of section 36 of the Act gives a right to a shareholder in a Company to inspect the register of the members. Sub-section (2) gives a right to him to require the Company to supply a copy of the register, or any part of it. Sub-section (3) provides a remedy in case the Company refuses to allow him to inspect the register, but the section is silent as to any remedy for a failure to give a copy of the register. It was held in *British India Corporation, Ltd.* v. *Robert Menzies*[1], that the Court has inherent jurisdiction to pass orders to compel due observance of the statutory obligations of a Company, and, accordingly that the Company Court could pass an order compelling the Company to furnish a copy of the register of its members. Now the applicant states that his case is on all fours with this. He states that there is an obligation on the respondent to hand over the books, etc., of the Company to him as he, the applicant, is now the Secretary and Treasurer of the Company. Further more, he urges that the District Munsiff Court has no jurisdiction to hear and consider the matters in respect of which he complained, as they are matters falling within the jurisdiction of the Company Court alone, *i.e.*, of this Court. In respect of this second part of his argument he relies furth r on *British India Corporation, Ltd.* v. *Robert Menzies*[1], for in that case it was held that the District Court of Cawnpore had exclusive jurisdiction to determine the matter.

Now, before *British India Corporation, Ltd.* v. *Robert Menzies*[1], can be called in aid for the first part of his argument, it seems to me that he must establish that he has a right given to him under the Companies Act, the protection of which is not expressly provided for therein. Now, I find it difficult to follow the applicant in this part of his case. As I have already observed, he says that he has been validly appointed as Secretary and Treasurer and that the respondent has been removed from those offices and, accordingly, that he is entitled to have the property of the Company handed over to him. If his appointment is valid, this, of course, follows. But I am unable to appreciate how it is said that this follows by reason of some provision of the Act. In other words, I am unable to appreciate how the applicant can be regarded as having in that respect some special right given to him by the Act. It seems to me that his position is simply that of a person, who alleges that he has been wrongfully deprived of his office, or of some property, or that he has been kept out of property wrongfully. In none of these cases is he complaining

1. (1936) I.L.R. 58 All. 988.

of an infringement of a right given to him by the Companies Act and it seems clear that he has a remedy, *viz*, by suit. That being so, I can see no justification for the contention that a remedy must necessarily be given under the Companies Act. In *British India Corporation, Ltd.* v. *Robert Menzies*[1], it was observed as follows :

"It is distinctly provided by section 3 that the Courts specified in that section have jurisdiction under the Companies Act. A reference to the Act shows that there are various statutory obligations cast upon companies by the Act and that with respect to most of those obligations penalties have been provided for by the Act. There is, however, in many cases no specific provision in the Act as regards the authority of the Court to enforce compliance with the provisions that define and regulate those obligations. Nevertheless it seems to us that the Courts referred to in section 3 of the Act have inherent jurisdiction to compel due observance of the mandatory provisions of the Act. As has been pointed out by the learned District Judge, it is a fundamental principle of legal administration that where the law requires something to be done there must be in existence a Court that can directly order it to be done. It is well understood in all systems of civilised jurisprudence that where there is a right there is a remedy."

However apt these observations may be in respect of the right of a Court to enforce a particular statutory obligation, in cases where the Act imposing that obligation makes no reference to the method of enforcement, I cannot accept that they have any application in a case like the present, where, as I have already indicated, I am satisfied that the right, if any, of the applicant is one in respect of which he could, if he were so minded, seek relief in the ordinary Courts.

Further, I cannot accept the second part of the applicant's contention, *viz.*, that this Court as the Company Court is the only Court having jurisdiction to enquire into these matters and with the greatest respect to the learned Judges who decided *British India Corporation, Ltd.* v. *Robert Menzies*[1], I am unable to agree with their decision so far as it supports that contention. There is, in my view, no provision in the Indian Companies Act which gives the Company Court (*i.e.*, the Court having jurisdiction under the Act) exclusive jurisdiction in all Company matters. The law reports both in India and in England are full of cases, which refute any such contention. I have been referred to a large number of those cases by counsel for the respondent, but I think it will be sufficient if I observe that there are undoubtedly many such cases. It is, I think, unnecessary to give the references in detail. There is also a considerable body of authority for the proposition that many of the special remedies provided by the Act are equally enforceable in the other Courts by suits. This being so, it is in my view impossible to regard the Company Court as having exclusive jurisdiction in all matters pertaining to Companies. In the present case, as I have already observed, the applicant may have a good ight of action against some person, the Company, the respondent, or whoever he may select, in respect of his deprivation of the office of Secretary and Treasurer. He may have a right of action for the return to him of the properties of the company. It would be improper for me to express any view as to the form of action, which may be open to him. He must take such action as he may be advised. All I say in this judgment is that I am satisfied that there is no remedy provided for his case under the special provisions of the law contained in the Indian Companies Act. My decision is merely that this Court, the Company Court has no jurisdiction to accept his application in its present form. Accordingly, the application is dismissed with costs and the interim order of 25th April, 1946, will be dissolved.

V.S. *Application dismissed.*

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1. (1936) I.L.R. 58 All. 988 at 993.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Yella Papayya .. *Appellant**

v.

Yella Suryanarayana (minor) by mother and next friend Ammanna .. *Respondent*.

Civil Procedure Code (V of 1908), section 100—Question of law—Inference from proved facts—Partition among members of family—Documentary evidence consistent with partition—Finding of lower Court—Interference in second appeal.

Two brothers who were at one time joint settled down in different villages and they were each of them enjoying in his village the potter service inam lands and rendering service pertaining to that office. It was shown that taxes were paid separately by each branch in respect of the properties in the respective villages and one did not pay taxes for the lands in the other's village. There was, further, separate cultivation of the property and separate enjoyment. Water applications were made by the defendant in his own name and orders were issued to him. Similarly, land encroachment notices were served upon the defendant in his own name. The defendant also dealt with the properties as belonging to him individually by mortgaging it on several occasions.

Held, that the cumulative effect of the documents and the evidence was that the parties had become divided and that the property in the hands of the defendant was his separate property and not joint family property in which the plaintiff who belonged to the other branch could claim a share.

When the question of drawing a legal inference from an appraisement of the facts arises the case involves a question of law on which the High Court in second appeal can finally decide.

Appeal against the decree of the Court of the Subordinate Judge of Amalapuram, dated 19th September, 1944, and passed in A. S. No. 26 of 1944, preferred against the decree of the Court of the District Munsiff, Razole, in O. S. No. 267 of 1941.

V. Vijyanna for Appellant.

V. Parthasarathi for Respondent.

The Court delivered the following

JUDGMENT.—The facts leading to this second appeal are these : Venkanna and Pattayya were two brothers who were at one time joint. They seem to have settled down in different villages, Venkanna in Madicharlapalam and Pattayya in Mattapparru and they were each of them enjoying in his village the potter service inam lands and rendering service pertaining to that office. Pattayya died about 1920 and Venkanna who survived him died about 1934. In spite of Pattayya's death and Venkanna becoming the head of the family, it would appear that there was no disturbance of any kind in the occupation and enjoyment of the property belonging to Pattayya by his widow and son, at Mattapparru. The plaintiff is Venkanna's son and the defendant is Pattayya's son. The present suit was filed by the plaintiff's next friend on 29th November, 1941, alleging that the family continues to remain joint and that both the Mattapparru and Madicharlapalam properties should be partitioned in equal shares between the plaintiff and the defendant.

The defendant contested the suit averring that there had been a partition 40 years ago and that each branch had lived separately in different villages enjoying their separate properties and performing potter's service each in his own right. The learned District Munsiff accepted the defendant's contention and dismissed the plaintiff's suit. The lower appellate Court however on appeal reversed that decree and holding that the family still remained joint, granted a preliminary decree for partition. The defendant has appealed against that decree of the Subordinate Judge.

A considerable amount of documentary evidence was put in on behalf of the appellant. There is, to start with the fact that the defendant's family lived in Mattapparru even during Pattayya's lifetime, that Pattayya died in Mattapparru and after his death the plaintiff's father did not assert his right as the *kartha* of the family and assume management in respect of the Mattapparru property. Then

* S. A. No. 604 of 1945. 26th March, 1946.

there is the fact that taxes were paid separately by each branch in respect of the properties in the respective villages. One did not pay taxes for the lands in the other's village. There was, further, separate cultivation of the property and separate enjoyment. Water applications were made by the defendant in his own name to the authorities and orders were issued to him. Land encroachment notices were served upon the defendant in his own name. The defendant dealt with the properties as belonging to him individually by mortgaging it on several occasions. Ex. D-3 was a mortgage of that kind dated 22nd September, 1935. Ex. D-4 is another mortgage, dated 3rd July, 1937, and Ex. D-6 is an usufructuary mortgage executed by the defendant. The learned District Munsiff took into account all these factors and in a short, but neat, judgment discussed them and came to the conclusion that although there was no deed of partition to evidence the actual partition between the parties, the evidence relating to separate enjoyment established beyond doubt that there was partition between the plaintiff's father and the defendant's father and that the properties were subsequently enjoyed by the plaintiff and the defendant separately in their own individual rights. The learned Subordinate Judge approached the question altogether from an erroneous point of view. He took up each document separately and found with regard to each of them that it was not conclusive in nature. This scrutiny was on the basis that each of those documents was genuine. In the end however he made a surprising statement to the effect that the defendant had been cooking up the documents from 1934 thereby casting a doubt on the genuineness of the entire series of documents beginning from Exs. D-2 to D-11 including most of the tax receipts comprised in Ex. D-1 series. This was nobody's case. Even the plaintiff did not and could not possibly have questioned the genuineness or authenticity of these documents which are all either public or registered documents in the nature of tax receipts, notices under the Madras Survey and Boundaries Act, registered mortgage deeds and proceedings of the Executive Engineer. In dealing with the oral evidence the learned Subordinate Judge while at one place completely discrediting the testimony of D. W. 2 who merely stated that he cultivated some land under the defendant, ultimately agreed that it was quite possible that D. W. 2 had cultivated the land. Mr. Viyyanna, the learned advocate for the appellant, has rightly stressed that the learned Subordinate Judge was wrong in not taking all the documentary evidence and the several factors, established thereby in their combined effect into account and his way of dealing with the case by examining each document or each circumstance separately and holding that it was not conclusive was not correct. I agree with that contention. As stated by the Privy Council in *Parbati* v. *Naunilal Singh*[1], the cumulative effect of all the documents should be taken into account in ascertaining whether in such circumstances a partition had actually been effected. Their Lordships said :

> "It is unnecessary to examine all the other documents in the case. Few, if any, of them are inconsistent with the defendant's case ; many of them are quite inconsistent with that of the plaintiff. The High Court examined them in great detail. They dealt with them, however, in what, in their Lordships' opinion, was an erroneous method. They apparently only considered whether each document was by itself sufficient to rebut the *prima facie* presumption that, as the plaintiff's family were admittedly a joint Hindu family before 1861, it continued to be joint, and omitted to take into account the cumulative effect of all these documents."

These remarks are quite apposite to the facts and circumstances of the present case. I have no doubt whatever that for failure of a correct approach, the learned Subordinate Judge has arrived at a conclusion which is not warranted by the evidence and the circumstances established in the case. If all the various facts adverted to above are taken into account *in cumulo* the only possible inference is that even during the lifetime of Venkanna and Pattayya, there was a partition between them and that subsequently each branch settled down in different villages and attended to the performance of potter's service in their own right and enjoyed the property belonging to them separately. In these circumstances the learned District Munsiff

1. (1909) I.L.R. 31 All. 412.

was right in drawing the inference that a partition had taken place and that the property in Mattapparru which was in the possession of the defendant was his own separate property and was not in the nature of joint family property in which the plaintiff could claim a share.

Learned advocate for the respondent contends that the finding of the learned Subordinate Judge is in the nature of a finding of fact and that in second appeal the same should not be disturbed, and he relies on *Secretary of State for India* v. *Rameswaram Devasthanam*[1]. All that that case laid down, relying on *Wali Muhammad* v. *Muhammad Baksh*[2], was that where the question to be decided is one of fact it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were really historical materials have to be construed for the purpose of deciding the question. There is no such instrument in this case which is in the nature of merely a historical material or document upon which no title is founded. On the other hand there are clear dicta of the Privy Council in other cases holding that where the inference is a legal inference arising from facts, the proper effect thereof is a question of law. In *Dhanna Mal* v. *Moti Sagar*[3], their Lordships stated :

> "Now their Lordships would be the last to seek to abridge the effect of sections 100 and 101 of the Code of Civil Procedure or weaken the strict rule that on second appeal the appellate Court is bound by the findings of fact of the Court below. They are well aware, moreover, that questions of law and of fact are often difficult to disentangle. It is clear, however, that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them, in a case like the present, to be a legal inference from facts and not itself a question of fact."

It is well settled that when in the appraisement of facts and in the process of drawing an inference therefrom a legal principle has been or is to be applied, there is a question of law involved. As stated by the Privy Council as early as the decision in *Ramgopal* v. *Shamskhaton*[4], the facts found need not be questioned but it is the soundness of the conclusions from them that is in question and that is a matter of law.

The appeal is therefore allowed with costs here and in the lower appellate Court and the judgment and decree of the lower appellate Court are reversed and the judgment and decree of the District Munsiff of Razole are restored.

(Leave refused).

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Moturu Nagaraju .. *Appellant**

v.

Moturu Parvatamma .. *Respondent.*

Hindu Law—Maintenance—Wife's suit for separate maintenance—Dismissal by the first Court as no case made out for separate maintenance—Appeal—During appeal attempt at settlement by living together—Parties reporting inability to live together—Appellate Court decreeing maintenance without considering the evidence—Propriety—Living together 'without prejudice' to rights—If puts an end to the cause of action of the wife.

A suit for separate maintenance by a wife against her husband was dismissed by the first Court on the ground that the plaintiff had not made out a case for separate maintenance. In the appellate Court the District Judge gave some time on the request of the parties to find out whether they could live amicably. After some time they reported that they could not live together and the District Judge gave a decree for maintenance at a particular rate without considering whether the plaintiff was entitled to separate maintenance. In second appeal,

Held, that the Judge was not entitled to decree the suit without first deciding whether the plaintiff had made out a case for separate maintenance.

1. (1934) 66 M.L.J. 595 : L.R. 61 I.A. 163 : I.L.R. 57 Mad. 652 (P.C.).
2. (1929) 59 M.L.J. 53 : L.R. 57 I.A. 86 : I.L.R. 11 Lah. 199 (P.C.).
3. (1927) 52 M.L.J. 663 : L.R. 54 I.A. 178; I.L.R. 8 Lah. 573 (P.C.).
4. (1892) L.R. 19 I.A. 228 : I.L.R. 20 Cal. 93 (P.C.).

* S. A. No. 779 of 1945. 7th August, 1946.

Held further, that the fact that the parties tried to live together during appeal which was only an attempt at settlement "without prejudice" did not put an end to the suit. It would be improper for any party to take advantage of any such friendly offer and contend that the suit had come to an end and that the cause of action, if any, had disappeared by reason of such living together.

Venkataramaraju v. *Rajagopalaraju*, (1943) 2 M.L.J. 641, distinguished.

Appeal against the decree of the District Court, Vizagapatam, in A. S. No. 166 of 1944, preferred against the decree of the Court of the District Munsiff, Yellamanchilli, in O. S. No. 238 of 1941.

E. Venkatesam for Appellant.

D. V. Reddi Pantulu for Respondent.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. The appeal arises out of a suit filed by the wife for recovery of separate maintenance due to her from her husband. Her case was that there was neglect and ill-treatment. The first Court found that the plaintiff had not made out a case for separate maintenance and dismissed the suit. When the matter came up before the appellate Court, it was proposed by both the parties that they would try to settle between themselves and that some time might be given to see if it would be possible for them to live together happily. Some time was given and after that, they reported that they could not live together with the result that the learned District Judge gave a decree for maintenance at Rs. 15 a month. He has not considered the question whether the plaintiff is entitled to a separate maintenance. The case in the first Court has been disposed of on the ground that the plaintiff has not made out a case for separate maintenance and it is on that ground that the suit was dismissed. Without considering the evidence on that point and without coming to a conclusion whether the plaintiff was entitled to separate maintenance, the learned District Judge proceeded to ascertain what the assets of the family were and on that basis he gave a decree for maintenance. He was certainly not entitled to do so. He must first decide whether the plaintiff has made out a case for separate maintenance and then ascertain what the income will be and on the basis of that income, arrive at a figure as regards the rate of that maintenance, taking into consideration the other liabilities and burden on the husband in respect of the other members of the family.

It is now urged before me for the appellant that since the parties have gone and lived together for some time, the suit cannot be decreed as a fresh cause of action had not arisen. I do not think I can accept it. It is only an attempt for settlement *without prejudice*. With the permission of the Court both the parties went and lived for some time to see if the dispute between them could be settled, on the distinct understanding that the parties would be able to proceed with the appeal in case they were not able to have a success with the experiment which they wanted to try. It will be improper to a party to take advantage of this friendly offer and say that the suit has come to an end and that the cause of action, if any, has disappeared by reason of their living together subsequently. Further, my attention was drawn to a ruling in *Venkataramaraju* v. *Rajagopalaraju*[1], where it was held that the previous cause of action was wiped out as the husband and wife had resumed cohabitation. But we have no such evidence on that point. In these circumstances I do not think it will be open to the lower Court to come to any conclusion against the plaintiff on the ground that there was an attempt for settlement and the parties with the permission of the Court lived for some time and both of them have reported that it was not possible for them to live together. In these circumstances the decree of the lower appellate Court is set aside and the appeal is remanded to the lower appellate Court to be disposed of on all the points raised in the appeal in the light of the observations made above.

The costs of this second appeal shall abide and follow the final result of the appeal in the lower appellate Court. The court-fee paid on the memorandum of the second appeal shall be refunded.

K.C. ——— *Appeal allowed and case remanded.*

1. (1943) 2 M.L.J. 641.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KUPPUSWAMI AYYAR.

Swaminatha Odayar and others .. *Appellants**

v.

Asan Muhammad Rowther and another .. *Respondents.*

Jurisdiction—Civil and Revenue Courts—Decision of question of title to land forming par of an estate within he meaning of the Estates Land Act and granting of consequential relief—Jurisdiction of Civil Court.

The Civil Court has the right to inquire into the question of title to land forming part of an estate within the meaning of the Madras Estates Land Act and to give consequential relief, provided that the relief is not in respect of which the Revenue Court has exclusive jurisdiction. Where the Court is concerned with a question whether the suit falls within section 189 (3) of the Madras Estates Land Act, it is not a suit which is triable by a Revenue Court.

Where the plaintiffs say that the defendant has no title whatever to the lands in suit, that they are in lawful possession, that they are entitled to a declaration that they are entitled to continue in possession of the lands, having obtained rights of permanent occupancy as the result of the passing of the Madras Estates Land (Third Amendment) Act, 1936, and that therefore they are entitled to an injunction restraining the defendant from interfering with their possession, the consequential relief prayed for cannot be granted by the Revenue Court. The Court which has jurisdiction to try such a suit is the Civil Court and all the questions raised in the suit can be tried by the Civil Court.

Appeal against the order of the District Court of West Tanjore at Tanjore, dated 13th August, 1943, and made in A. S. No. 1 of 1941 (O. S. No. 19 of 1939, Sub-Court, Kumbakonam).

K. Srinivasan for Appellants.

A. V. Viswanatha Sastri and *R. Swaminatha Ayyar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The question in this appeal is whether the Civil Court or the Revenue Court has jurisdiction to decide the questions raised in the plaint.

The properties in suit originally formed part of the Tanjore Palace Estate. In Original Suit No. 3 of 1919 of the District Court of West Tanjore the lands with other properties were allotted to one Vasudeva Sahib, a member of the family. The suit took the form of an interpleader action, but it was in effect a suit for partition. There was an appeal to this Court from the decree of the trial Court. The judgment of this Court was delivered on the 24th January, 1924. It was to the effect that Vasudeva Sahib had received more than his proper share in the estate. Consequently the Court modified the decree of the District Court. Restitution proceedings followed and resulted in the sale of the properties in suit to the first defendant on the 23rd December, 1938.

It is the plaintiffs' case that the properties with which the present action is concerned were leased to them or their predecessors in title by Vasudeva Sahib in 1925. They comprise 429·41 acres and according to the plaintiffs they form part of an inam village. This allegation is denied by the defendants. On the 12th March, 1928, Vasudeva Sahib sold the lands to one RM. P. R. M. M. Subramaniam Chettiar, plaintiffs 2 to 5 and the predecessors in title of plaintiffs 1 and 2 attorned to Subramaniam Chettiar, who on the 3rd June, 1929, granted them a lease for three years. On the 29th August, 1932, he renewed the lease for seven years.

In insolvency proceedings instituted in the Court of the Subordinate Judge of Tanjore in 1930, Vasudeva Sahib was adjudicated insolvent. On the 25th January, 1937, the Insolvency Court, on the application filed by the Official Receiver set aside the sale to Subramaniam Chettiar on the ground that it constituted a fraud on the creditors. The decision was confirmed by this Court on the 27th November, 1940. While the appeal was pending the plaintiffs filed a suit in the

* A. A. O. No. 800 of 1943. 26th November, 1946.

Revenue Court (Summary Suit No. 47 of 1938) for an order directing Subramaniam Chettiar to tender them a patta. This suit proceeded *ex parte* and resulted in a decree being passed in the plaintiffs' favour on the 24th September, 1938.

On his purchase of the properties in suit the first defendant sought to gain possession, but he was resisted by the plaintiffs who on the 2nd August, 1939, filed in the Court of the Subordinate Judge of Kumbakonam the present suit. They asked for a declaration that they are entitled to continue in possession of the lands, having obtained rights of permanent occupancy as the result of the passing of the Madras Estates Land (Third Amendment) Act, 1936. They prayed for consequential relief in the form of a permanent injunction restraining the first defendant from interfering with their possession and enjoyment of the properties. The first defendant pleaded *inter alia* that the Civil Court had no jurisdiction in the matter. The Subordinate Judge accepted this plea. He then went into the merits of the case and here also found against the plaintiffs. Accordingly he dismissed the suit with costs.

The plaintiffs appealed to the District Judge of West Tanjore. The District Judge agreed with the Subordinate Judge that the Civil Court had no jurisdiction, but he refrained from entering into a discussion of the merits. He directed the plaint to be returned for presentation to the proper Court. The appeal is from this order of the District Judge. In the first instance it came before Chandrasekhara Aiyar, J., who referred it to a Bench for decision as he considered that the judgments of this Court in *Appa Rao* v. *Gurraju*[1] and *Raja Rajeswara Sethupathi* v. *Muthudayan*[2] had bearing on the question of jurisdiction and were in conflict. On the 20th November, 1946, the appeal came up for hearing before a Division Bench consisting of Patanjali Sastri and Bell, JJ., who referred it to a Full Bench.

In our opinion it is quite unnecessary for this Court to consider the conflict between *Appa Rao* v. *Gurraju*[1] and *Raja Rajeswara Sethupathi* v. *Muthudayan*[2], because the conflict is not on the question whether a s it of this nature will lie in the Civil Co rt. The conflict is merely with regard to the effect of a decision of a Revenue Court on a suit filed subsequently in a Civil Court. What the Court is here concerned with is whether the suit is one which falls within section 189 (3) of the Madras Estates Land Act. A perusal of the schedule to the Act makes it clear that it is not a suit which is triable by a Revenue Court. The Civil Court has the right to inquire into the question of title to land forming part of an estate within the meaning of the Estates Land Act and to give consequential relief, provided that the relief is not in respect of which the Revenue Court has exclusive jurisdiction.

Our attention has been drawn to the following observations in the judgment delivered by Phillips, J., in *Raja Rajeswara Sethupathi* v. *Muthudayan*[2] :

"If the land is ryoti land, the ryot is bound to accept patta and execute a muchilika. If therefore he brought a suit in a Civil Court for a declaration of his right of occupancy, he would be entitled to further relief of the grant of patta. If he asks for this further relief he would have to be referred to a Revenue Court and if he failed to ask for such relief, the Court would not grant a bare declaration. This difficulty has been met by the Legislature by enacting that the Revenue Court shall determine the right of a party to the grant of patta in a suit under section 55 or 56, and consequently that question must be deemed to be one exclusively within the jurisdiction of the Revenue Court."

We can see no objection to the statement where the consequential relief sought is the grant of patta. That is not the conseq ential r lief as ed for here. The plaintiffs say that the first defendant has no title whatever to the land, that they are in lawful possession and that therefore they are entitled to an injun tion restraining the first defendant from interfering with th ir possession. Consequential relief of this nat re cannot be granted by the R venue Court. The Court which has juris iction is the Civil Court, and all the questions raised in the pleadings can be tried by the Civil Court. It will of course be open to the first defendant to contend that the decision in Summary Suit No. 47 of 1938 is not binding on him.

1. (1920) 39 M.L.J. 476 : I.L.R. 43 Mad. 859. 2. (1928) 55 M.L.J. 379 : I.L.R. 52 Mad. 332.

It follows that in our opinion the District Judge should have inquired into and decided the case on the merits and not directed the plaint to be returned for presentation to the Revenue Court. The appeal is allowed and the case is remanded to the District Judge for a decision on the merits.

The party ultimately successful will be entitled to the costs of this appeal.

V.S. ——— *Appeal allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE KUPPUSWAMI AYYAR.

Padarty Balayya .. *Appellant**

v.

Darapureddi Parvateeswararao and others .. *Respondents.*

Hindu Law—Decree on promissory note against father and sons and joint family property in their hands—Execution against shares of sons—Limitation—Period between adjudication of father as insolvent and annulment—If can be excluded for purposes of execution of the decree as against the sons.

When sons are joined with the Hindu father in a suit on a promissory note and a decree is obtained against the father and the sons as well as the joint family property in their hands, the claim against the sons must be deemed to have been put in suit and merged in the decree and the only mode of enforcing such claim is by executing the decree against the sons. Such a decree is executable against the sons even during the period that the father was an adjudged insolvent. The period during which the insolvency proceedings against the father were pending (date of adjudication to date of annulment) cannot be excluded in computing the period of limitation for execution of the decree against the sons.

Kuppuswami Goundan v. *Lakshmi Achi*, (1943) 1 M.L.J. 285; *Krishna* v. *Sami*, (1940) 1 M.L.J. 369 : I.L.R. 1940 Mad. 815 and decision in C. M. A. No. 634 of 1941, distinguished; *Venkataranga Reddi* v. *Chinna Sithamma*, (1941) 1 M.L.J. 270, followed.

Appeal against the order of the District Court, West Godavari, dated 15th August, 1945, in E. P. No. 48 of 1944, in O. S. No. 61 of 1932.

V. Suryanarayana for Appellant.

K. Bhimasankaram for Respondents.

The Judgment of the Court was delivered by

Kuppuswami Ayyar, J.—The plaintiff decree-holder is the appellant, and the appeal is against an order dismissing his petition for executing the decree against defendants 2 to 6 in O. S. No. 61 of 1932, on the file of the District Court, Ellore. The suit was filed, not only against the father, the first defendant, but also against his sons in respect of money due on a promissory note. A decree was passed not only against the father but against the sons defendants 2 to 4 also as against the joint family property in their hands. The decree was passed on the 28th August, 1933. The execution petition was filed against defendants 2 to 4 only and against defendants 5 and 6 who were born subsequent to the decree in the suit and who were added in their individual capacity in the execution proceedings. The first execution petition, E. P. No. 24 of 1934, was filed against the father and sons on the 6th January, 1934, and it was struck off on the 1st March, 1936, for want of bidders. On the 15th December, 1934, the first defendant was adjudged insolvent in I. P. No. 25 of 1934 on the file of the District Court, West Godavari. On the 15th September, 1942, the adjudication was annulled and the property reverted to the insolvent. He died on the 26th January, 1941. E. P. No. 48 of 1944 was filed on the 22nd April, 1944, for attachment and sale of the 4/5th share of the joint family property belonging to the sons only, because they had already filed the suit O. S. No. 701 of 1941 for partition and obtained a decree in respect of the 4/5th share of the joint family properties on 20th April, 1943.

* A. A. O. No. 620 of 1945. 29th November, 1946.

It was contended that the execution petition, E. P. No. 48 of 1944, was barred inasmuch as it was filed more than three years after the date of the final order passed on the previous application, E. P. No. 24 of 1934. It was argued for the decree-holder that the period from the date of the adjudication of the first defendant, the father, to the date of annulment should be deducted and if it was deducted, the petiti n would be in time. What was sought to be attached was the property in the hands of the sons and not of the father. and as it was the father who was declared insolvent and not the sons, the period could not be excluded. In law, the interest of the sons in the joint family properties does not vest in the Official Receiver on the adjudication of a joint Hindu father. Consequently it is only as against the interest of the father in th joint family properties that execution cannot proceed. Since the pendency of the insolvency proceeding would not be a bar to the execution of the decree as against the sons and their interest in the family properties, it was contended that this period could not be excluded. The learned Subordinate Judge agreeing with this contention dismissed the execution petition as barred by time. The decree-holder has hence filed this appeal.

It is contended relying on the decision of this Court in C. M. A. No. 634 of 1941 that as the decree was alive against th father, it could be executed as against the sons; but then, that was a case in which the decree was sought to be executed as against the sons on the death of the father as his legal representatives. In this case, it is not as legal representatives of the father, the insolvent, that the decree was sought to be executed against the sons, against whom there was a decree passed on that date. So this decision cannot apply to the facts of the case. Reliance was also placed on the decision in *Kuppuswami Goundan* v. *Lakshmi Achi*[1], but this was not a case in which the question of limitation to the execution of the decree was considered. In that case the decree was obtained as against the father and son on a promissory note executed long before adjudication. Learned counsel for the appellant also relied on the case in *Krishna* v. *Somi*[2]. All that was held was that where a decree had been obtained against the father in a suit in which the sons were also impleaded and the claim as against the sons was not pressed, the decree could be executed as against the sons on the ground that the decree-holder was entitled to enforce the pious obligation of the sons in respect of the decree. None of the cases cited have any application to the facts of the present case.

The question was considered in *Venkataranga Reddi* v. *Chinna Sithamma*[3] by a Bench of this Court in which they held :

> "But when the son is joined in the suit and a decree is obtained binding his interest also, the claim against him based upon his obligation must necessarily be deemed to have been put in suit and merged in the decree, and the only mode of enforcing such claim is, as it seems to us, by executing the decree against him."

We respectfully agree with these observations.

In the present case, the decree that was sought to be executed was the decree against the sons, and it was executable even during the period that the father was adjudged insolvent. The learned District Judge was therefore justified in finding that the petiti n was barred by limitation and that the period during which the insolvency against the father was pending could not be excluded in computing the period of limitation for the execution petition.

The appeal accordingly fails and is dismissed with costs.

V.P.S. *Appeal dismissed.*

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1. (1943) 1 M.L.J. 285.
2. (1940) 1 M.L.J. 363 : I.L.R. 1940 Mad. 815.
3. (1941) 1 M.L.J. 270.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Sri Rajah Ravu Venkata Mahipathi Suryarao Bahadur Garu of of Pithapuram .. *Appellant**

v

Mattapalli Chalamayya and others .. *Respondents.*

Civil Procedure Code (V of 1908), sections 144 and 151—Invoking inherent jurisdiction when other remedy provided—Justification—Appeal against such order—Maintainability—Limitation Act (IX of 1908), Article 181—Order of appellate Court determining nature of decree—Starting point of limitation for application for refund of money wrongly paid.

In execution of a decree by the respondent herein certain sale proceeds were realised and distributed among the respondent and the two appellants in the two appeals who were also decree-holders in two other suits against the same judgment-debtor. One of the appellants got his share on the footing that he was a money decree-holder, but it was held on appeal to the Privy Council that he was entitled to a charge decree only having a vendor's lien and that he had no right to proceed against the general assets of the judgment-debtor. Meanwhile a suit filed by the respondent claiming a first charge over the proceeds was dismissed with a declaration that the above said appellant was not entitled to any rateable distribution. An application by the respondent to direct that appellant to refund the money drawn by him was allowed by the trial Court under its inherent powers under section 151, Civil Procedure Code.

Held, on appeal by that appellant that (*i*) while the existence of a remedy by suit may be a ground for the Court whose inherent jurisdiction is invoked to say that it will not exercise such jurisdiction and that the party may file a suit, there is no justification in depriving a Court of its inherent jurisdiction to pass appropriate orders revoking, where the ends of justice so require, its own wrong orders based on assumptions which later on have been proved to be baseless ; (*ii*) though an appeal may not be maintainable against such an order, treating the appeal as revision, there was no reason to interfere as the order holding that the appellant was entitled only to a charge decree confers upon the respondent the right to apply for a refund of the amount wrongly paid, and as the proper article of the Limitation Act applicable is Article 181, the respondents having applied within three years from the date of the order, were within time in seeking refund of the amount; (*iii*) the other appellant could file a separate application for rateable distribution and the question whether the refund now ordered would enure for his benefit might be considered in that application.

Appeals against the order of the Court of the Subordinate Judge, Coconada, dated 29th December, 1944, in E. A. No. 680 of 1938, in O. S. No. 92 of 1920.

Ch. Raghava Rao and *G. C. Venkatasubba Rao* for Appellant in A. A. O. No. 395 of 1945 and Respondent in A. A. O. No. 396 of 1945.

P. Somasundaram, P. Suryanarayana, A. Sundaram Ayyar and *Srimati G. Durgabai* for Respondents in both.

The Court delivered the following

JUDGMENT.—These two connected appeals arise out of an order made by the Subordinate Judge of Coconada on an application by the decree-holders in O. S. No. 26 of 1928 on the file of the Court of the District Munsiff of Cocanada or the refund of a sum of Rs. 1,466-6-0 which the Maharajah of Pithapuram obtained in rateable distribution of the assets of the Zamindar of Polavaram against whom three decrees had been obtained (1) by the Mullapudi people in O. S. No. 92 of 1920, Sub-Court, Coconada, (2) by the Mattapalli people in O. S. No. 26 of 1928 on the file of the District Munsiff's Court, Coconada and (3) by the Maharajah of Pithapuram in O. S. No. 4 of 1924 on the file of the Agency Court, Bhadrachalam. In execution of the decree in O. S. No. 26 of 1928 certain sale proceeds were realised and they were transferred to the Sub-Court, Coconada, which distributed those proceeds to the three decree-holders mentioned above. The Maharajah of Pithapuram got Rs. 1,466-6-0 in this distribution on the footing that his decree was a money decree, which was what the first Court as well as the High Court on appeal held but on appeal to the Privy Council it was held by its judgment dated 28th

* A. A. Os. Nos. 395 and 396 of 1945. 27th August, 1946.

April, 1936, that he was entitled only to a charge decree having a vendor's lien and that he had no right to proceed against the general assets of the judgment-debtor.

As soon as there was an order of rateable distribution in favour of the Maharajah of Pithapuram, the Mattapalli people filed O. S. No. 487 of 1933 making him and the Mullapudi people defendants and asking for a declaration that they had a first charge over the proceeds and that neither the Maharajah of Pithapuram nor the Mullapudi people had any right in the sale proceeds. An injunction was sought against them. This suit was dismissed by the Court on the ground that the plaintiffs (Mattapalli people) had no first charge over the proceeds. On appeal which was decided on 6th January, 1938, the decree was confirmed but a declaration was embodied in it to the effect that the Maharajah of Pithapuram was not entitled to any share of rateable distribution, as it had been held by the Privy Council by that date that he was only a charge decree-holder and not a money decree-holder.

Thereupon the present application, E.A. No. 680 of 1938, was filed by the Mattapalli people on 25th July, 1938, for directing the first respondent to refund the sum of Rs. 1,466-6-0 taken by him together with interest at nine per cent. per annum. To this application the judgment-debtor namely the Zamindar of Polavaram as well as the Mullapudi people were made party respondents. The Maharajah of Pithapuram raised various defences to the application one of which was that it did not lie under section 144 of the Civil Procedure Code, not being in the nature of restitution proceedings. He also pleaded that the application was barred by limitation because the decree in O. S. No. 26 of 1928 was itself barred. The Mullapudi people made common cause with the first respondent and wanted this application to be dismissed. In the counter-statement that they filed, they denied the petitioners' sole right to the amount which they wanted to be refunded and that the plaintiffs were estopped from contending that they had no right to a share in the same.

The learned Subordinate Judge held that the application was not covered by section 144 of the Code of Civil Procedure but that he had inherent powers under section 151 to make an order directing the Maharajah to refund the amount to which it was found that he had no title as the Privy Council had held that it was a charge decree and not a money decree. He further held that so far as the Mullapudi people were concerned they had no right to claim a share in the amount to be refunded as they had not filed any suit under section 73 (2), as was done by the petitioners, urging that that the distribution of any part of the assets to the first respondent was improper and that they should get their share in the amount wrongfully paid to him.

The Maharajah of Pithapuram has preferred C. M. A. No. 305 of 1945 against this order while the Mullapudi people have filed C. M. A. No. 396 of 19 5.

Preliminary objections have been taken as to the maintainability of this appeal by Mr. P. Somasundaram who says that as the order by the lower Court was made in the exercise of its inherent powers of jurisdiction under section 151, there is no appeal from such an order and that at best only revisions would lie. The answer to this argument attempted by Mr. Raghava Rao is that as the Code of Civil Procedure provides under section 73 (2) a remedy by way of suit where a person not entitled to rateable distribution is paid wrongfully a portion of the assets, there is no inherent jurisdiction in a Court to reverse its own orders in any other manner. I do not agree with this contention. The remedy by way of suit should oftentimes involve much more delay and expense than an application. While the existence of such a remedy may be a ground for the Court whose inherent jurisdiction is invoked to say that it will not exercise such jurisdiction and that the party may file a suit, there is no justification in depriving a Court of its inherent jurisdiction to pass appropriate orders reversing, where the ends of justice so require, its own wrong orders based on assumptions which later on have been proved to be baseless. To accept the appellant's contention is to tie down the hands of the Court and throw upon the parties needlessly burdensome litigation.

While I am prepared to uphold the preliminary objection that no appeals lie from an order made by the lower Court under its inherent jurisdiction, I do not think it necessary or proper to scotch them on this ground. There can be no objection to these appeals being treated as revision petitions, and the merits and points in issue being gone into on this basis.

The Maharajah of Pithapuram, the appellant in C. M. A. No. 395 of 1945 has no merits whatsoever in his favour. He has got in his hands money to which he is not entitled according to the decision of the Privy Council and he must bring it back unless there is some point of law which entitles him to escape this liability. I am not able to find any such escape for him. That he was not entitled to get this money was held by the Privy Council as stated already. There was again a declaration in the suit O. S. No. 487 of 1933, filed by the petitioners to the same effect. It is no use for him to plead that the decree in O. S. No. 26 of 1928 which the petitioners have obtained is barred or has been held to be barred in some previous stage of the proceedings. We are not concerned with that decree. The application has been filed within three years from the date of the order of the Privy Council holding that the appellant is not entitled to a money decree but only to a charge decree. This order confers upon the petitioners the right to apply for refund of the amount paid on the basis that he held a money decree. Article 181 of the Limitation Act is therefore applicable. The lower Court has held that the proper article under which the application should be made is Article 183. Whichever article is applied, the petitioners are within time in seeking the refund of the amount from the appellant in C. M. A. No. 395 of 1945. The order of the lower Court is confirmed and this appeal is dismissed with costs of respondents 1 to 4.

Next coming to C. M. A. No. 396 of 1945, the connected appeal, objection has been raised by Mr. Somasundaram that the appellants are not entitled to any share in the amount to be refunded by the Maharajah of Pithapuram as they did not seek to set aside the order distributing a portion of the assets to him and as in the counter statement that they filed to this application they sided the first respondent and asked that the petitioners' application for refund should be dismissed as barred by time and as incompetent for other reasons. As pointed out already the question is not so simple as this, for, though it may be that the Mullapudi people did not file any suit, as the Mattapalli people did, to have the rateable distribution order set aside, it is undeniable that in this application they have repudiated the claim of the petitioners to the whole amount and have further pleaded that the petitioners were estopped from denying their rights to rateable distribution, which must refer only to the sum which is now in dispute. Whether by reason of their not having filed a suit under section 73 (2) Civil Procedure Code within the period of limitation, it can be said that they had lost the right to get their share of the amount now ordered to be refunded is a question that has not received adequate attention or consideration at the hands of the lower Court. Assuming that the decree which they obtained in O. S. No. 26 of 1928 is barred, would any rights accrue to them as a result of the order of the Privy Council, and if so would an enforcement of that order, by asking the first respondent to disgorge what he had got, enure for their benefit also or whether they are prevented from claiming any share because the petitioners had alleged in the suit that they had brought (O. S. No. 487 of 1933) as well as in the present application that they alone are entitled to the amount are points that must be considered. I suggested to Mr. Sundaram Iyer, the learned advocate for the appellants in C. M. A. No. 396 of 1945, that his clients can file an application for rateable distribution seeking a share in the amount now directed to be refunded and have these questions considered in those proceedings. He is agreeable to do so. This would give an opportunity to the Mattapalli people to raise any objections they may think as to the maintainability of such an application and as to its merits. Subject therefore to this reservation, the right of the Mullapudi people to file an independent application, their C. M. A. No. 396 of 1945 is also dismissed with costs of respondents 1 to 4.

V.P.S. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

Subbu Naidu and others .. *Appellants**

v.

Varadarajulu Naidu and others .. *Respondents.*

Registration Act (XVI of 1908), sections 17 and 49 and Evidence Act (I of 1872), section 91—Unregistered partition "Koorchit"—Admissibility—Oral evidence to prove its terms—If admissible—Limitation Act (IX of 1908), section 14—Return of plaint for presentation to proper Court—Extent of time claimable as a deduction.

An unregistered document of September, 1928, described as a "partition Koorchit" provided that the parties having divided "all our family properties moveables, lands, etc," according to the advice of certain panchayatdars, the 1st defendant, plaintiff, second defendant and third defendant should respectively take the properties mentioned in A, B, C and D schedules and hold and enjoy them absolutely. The document then referred to the division on that day of the family debts and outstandings due to the family and concluded by declaring that "since, we have thus agreed and got the properties divided among us in the presence of panchayatdars we have no properties, debts or cash hereafter to be divided. From this day onwards we have excepting blood relationship, no other relationship in respect of assets and liabilities." In a suit by one of the parties to the above "Koorchit," against the others for a partition and account and for his share of properties and outstandings which still remained undivided, the above "Koorchit" was sought to be put in evidence by the defendants to prove a complete partition in September, 1928, but was rejected as being inadmissible "for any purpose".

On appeal, on the questions as to its admissibility in evidence, the purpose for which the recitals therein could be relied upon and whether oral evidence regarding the details of the partition arrangement was admissible,

Held, (1) it cannot be said that the unregistered "Koorchit" was inadmissible "for any purpose." Unlike the Indian Stamp Act which renders an instrument not duly stamped inadmissible "for any purpose", the Indian Registration Act prohibits its admission only for certain purposes. (2) It cannot be said that the "Koorchit" evidenced a valid partition of all the outstandings due to the family. As most of the debts consisted of mortgages of lands and as such stood on the same footing as the immoveable properties comprised in the document, the division of the outstandings cannot be regarded as a severable part of the transaction valid and operative so far as they were concerned. In a family partition, no part of the transaction can be separated from the rest unless it appears that the parties intended that that part should stand even though the other part should prove ineffectual. (3) The concluding declaration in the "Koorchit" that all the family properties had been divided and that there were no more properties, debts or cash left to be thereafter divided would not be admissible to prove that there was a complete partition on the date of the 'Koorchit'. Section 49 (*c*) of the Registration Act prohibits the admission of such a document as evidence of the partition. (4) The "Koorchit" was admissible to prove the adverse character of the 1st defendant's possession of the lands which were allotted to him under it though such allotment was ineffectual for want of registration. But as in the circumstances, the allotments were not real, but merely fictitious and colourable, no question of adverse possession could arise. (5) As the "Koorchit" was not receivable as evidence of the partition for want of registration, oral evidence as to the details of the complete nature of the partition would be equally inadmissible. Though a valid partition arrangement can be effected orally, where the terms of the arrangement have been reduced to the form of a document, section 91 of the Evidence Act prohibits the admission of any evidence of the terms except the document itself or secondary evidence of its contents where such evidence is admissible. As the "Koorchit" was unregistered and inadmissible as evidence of the partition, oral evidence to prove its terms, to show that there was a complete partition on the date of the document, was barred.

Case law discussed.

A plaintiff claiming a deduction of time between the date of the filing of a plaint and its return for presentation to the proper Court would be entitled to the deduction of only the time till the date of the endorsement on the plaint required by rule 10 (2) of Order 7, Civil Procedure Code is actually made. He would not be entitled to any deduction thereafter except perhaps where he can show that the Court delayed the return of the plaint in spite of his endeavour to take it back.

Appeal against the decree of the District Court, North Arcot, at Vellore, in O. S. No. 4 of 1944, etc.

P. Satyanarayana Rao, V. V. Raghavan and *V. Balcramiah* for Appellants.

D. Munikanniah, K. N. Subramaniyam, Ch. Raghava Rao and *G. Duraibai* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This is an appeal brought by defendants 1, 4 and 5 from a preliminary decree for partition and accounts passed by the District Court of

* Appeal No. 239 of 1945 and C. M. P. No. 2490 of 1945. 15th November, 1946.

North Arcot. The suit was originally brought by the first respondent in the Court of the District Munsiff at Arni but as the value of the properties involved was found to be beyond the pecuniary jurisdiction of that Court the plaint was returned to be presented to the proper Court and was later filed in the Court of the Subordinate Judge at Vellore from where it was transferred to the District Court.

The relationship of the parties to one another will appear from the following genealogical table :

Pasam Lingappa Naidu : Muniyammal (6th defendant).
(died 55 years ago). (died after suit).

- Subbu Naidu (1st Deft).
  - Ramakrishna Naidu (4th Deft.).
  - Rajaratna Naidu (5th Deft).
- Doraiswami Naidu (died in 1932).
  - Varadarajulu Naidu. (Plaintiff).
- Chinnaswami Naidu (2nd Deft.).
  - Badrachalam Naidu (7th Deft).
- Gopal Naidu (3rd Deft).

The family originally lived in a village called Vallam, North Arcot District, but migrated more than sixty years ago to the village of Oorkudi in the same district during the lifetime of Pasam Lingappa Naidu, the common ancestor who died in the nineties of the last century. It is common ground, that the family then owned lands and houses both at Vallam and at Oorkudi, and it is also in evidence that Lingappa Naidu was doing some money lending on a small scale and acquired some properties. Under the management of the first defendant after Lingappa's death, the money lending business was expanded and other properties at Oorkudi and elsewhere were purchased. But all was not well with the family as the youngest brother, the third defendant, fell into evil ways, incurred considerable debts by reckless living and was eventually adjudicated insolvent on his own petition. The plaintiff's father left the village on account of some misunderstandings and sought employment in Mysore State where he died in 1931 or 1932. In 1926 the plaintiff was married and there was separation in mess between the members who till then were living together. These facts were not disputed before us.

It was the plaintiff's case as disclosed in his plaint and in his evidence that the properties at Oorkudi alone were divided provisionally in 1928 as the third defendant was running into debts and it was thought desirable, in order to avoid trouble with his creditors, that the family properties should appear to have been divided, and that the family money lending transactions standing in the name of the first defendant and the properties purchased from the maternal uncle of the brothers should appear to have become the exclusive properties of the first defendant. When, however an attempt was made to bring into existence a document to that effect, the plaintiff and some others did not agree and the attempt was dropped. Thereafter in 1930, the provisional division of the Oorkudi properties was confirmed and some of the outstandings were also divided between the parties, the other immoveable properties and outstandings of the business being continued as joint family properties in the management of the first defendant on the understanding that he should account for these properties and that they should be divided after the disputes relating to the debts incurred by the third defendant were settled once and for all. After the third defendant obtained his discharge in 1937, the plaintiff demanded his share of the properties and outstandings which remained undivided and also of the properties subsequently acquired by the first defendant with the aid of family moneys, but failing to get satisfaction brought the present suit. Defendants 2, 3 and 7 supported the plaintiff and claimed that their shares also in the suit properties should be separated and given to them.

The first defendant and his sons, defendants 4 and 5 filed a joint written statement denying the main averments in the plaint. They alleged that the properties at Oorkudi were the only family properties and their income was hardly sufficient for the maintenance of the family. The family had no dealings or funds or outstandings. There was thus no family nucleus out of which other properties could be purchased. There was a complete partition in September, 1928 of all available family properties and thenceforward the parties lived as members of a divided family. At that partition the first defendant gave each of his brothers, out of grace, some money out of his own earnings. All the properties now claimed were his own self-acquisitions. The present suit for partition was therefore not maintainable. The suit was also barred by limitation and adverse possession.

The Court below found that the plea of self-acquisition broke down completely at the trial when the first defendant who was the principal witness for the defence admitted that he carried on money dealings for and on behalf of the family, which was having a surplus income even when he was 20 years of age, (he was 77, when he gave evidence) and that all the properties and outstandings which stood in his name in 1928 belonged to the family. Indeed, he disowned the allegations to the contrary in his written statement and stated that they were not based on his instructions. As regards the properties acquired by him after 1928, the learned District Judge found that the acquisitions were attributable to the realisation of the outstandings then existing, as the first defendant admitted that he had no money dealings with others after that year. These findings were not challenged before us by Mr. Satyanarayana Rao who appeared for the appellants. This leaves for consideration only the questions as to the maintainability of the suit and acquisition of title by appellants by adverse possession.

In order to establish that there was a complete partition in September, 1928, the first defendant produced in the Court below an unregistered "koorchit" or instrument of partition purporting to evidence a partition arrangement among the members of the family including the plaintiff and the properties allotted to the first defendant. As objection was raised to the admission of the document the learned Judge ruled that the document, being compulsorily registerable under section 17 (1) (*b*) of the Registration Act and not having been registered, could not be "looked into for any purpose." Having rejected the document, the learned Judge also excluded oral evidence regarding the details of the partition. On the other evidence on record he found that, apart from the ancestral lands at Oorkudi and outstandings to the extent of Rs. 20,000 which were admittedly divided. the first defendant was in possession of considerable extent of lands in other villages and outstandings amounting to Rs. 27,900, all of which had been acquired before 1928. This finding, was, for the most part, based on the admissions of the first defendant himself, and no serious attempt was made before us to displace it. As these properties were much in excess of the properties which were previously divided between the parties and as first defendant's attempt to make out that they were his self-acquisitions totally failed, the learned Judge accepted the plaintiff's case that only some of the properties were divided at the prior partition and the other properties of the family were left in the management of the first defendant as before to be divided after settlement of the disputes relating to the third defendant's liabilities. Mr Satyanarayana Rao referred to *Kumarappa Chettiar* v *Adaikkalam Chettiar*[1], where it was held that a partition admitted or proved to have taken place must be presumed to be complete, and that the burden of proving that certain properties were excluded from the partition lay upon him who alleged it. As has often been pointed out, when both sides have adduced their evidence in the case, the Court has ordinarily to determine the point in dispute on such evidence and the question of onus becomes immaterial. On the evidence in this case, the conclusion reached by the learned District Judge seems inevitable and we entirely agree with it.

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1. (1931) 62 M.L.J. 141 : I.L.R. 55 Mad. 483.

The main attempt of Mr. Satyanarayana Rao before us was to have the excluded *koorchit* admitted in evidence in the appeal and to establish, on the strength of it that the first defendant's case of a complete partition in September, 1928 was true or at any rate that his possession of the suit properties thereafter was exclusive and adverse to the plaintiff. Learned Counsel also complained that the learned Judge wrongly refused to admit oral evidence to prove that the properties and outstandings which according to the plaintiff, continued joint were, in fact, allotted to the first defendant's share at the partition.

The rejected *koorchit* has been filed in this Court with a petition for its admission in the appeal under Order 41, rule 27 (1) (*a*) of the Civil Procedure Code, which allows a party to produce additional evidence in appeal where " the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted." It was urged that the learned District Judge erred in holding that the unregistered *koorchit* was inadmissible " for any purpose." This contention is clearly right. Unlike the Indian Stamp Act which renders an instrument not duly stamped inadmissible "for any purpose," the Indian Registration Act prohibits its admission only for certain purposes (Section 49). *Ramayya* v. *Achamma*[1] relied on by the learned Judge lends no support to this view. Indeed, Mr. Munilanniah for the respondents did not attempt to support it. We are therefore of opinion that the document should have been admitted in evidence and, as its execution by the parties is not disputed before us, we admit it as additional evidence without formal proof.

The document is described as " partition *koorchit* " and it provides that the parties having divided " all our family properties, moveables, lands, etc." according to the advice of certain panchayatdars, the first defendant, plaintiff, second defendant and third defendant should respectively take the properties mentioned in A. B. C and D schedules and hold and enjoy them absolutely. It further provides that the first defendant should take the properties purchased from his maternal uncle Thoddappa Naidu, paying the purchase money himself for which he had executed a promissory note, and also certain other lands as his *Jesh'abagam* or the special share of the eldest brother. The document then refers to the division on that day of the family debts and outstandings due to the family and concludes by declaring that " since we have thus agreed and got the properties divided among us in the presence of the *panchayatdars* we have no properties, debts or cash hereafter to be divided. From this day onwards we have excepting blood relationship no other relationship in respect of assets and liabilities." It is signed by all the parties and the panchayatdars. Then follows " A schedule individual No. 1. Subbu Naidu," describing the item of immoveable properties allotted to the share of the first defendant. The document, however, seems incomplete in that it does not contain B, C and D schedules showing the items allotted to the other sharers.

We mention here, only to dismiss, a somewhat faint suggestion by Mr. Satyanarayana Rao, that the *koorchit* does not require registration as it is an award of arbitrators though accepted by the parties, and as such was exempted from registration under section 17 (2) (*vi*) as it stood before the Amending Act of 1929. It is, however, obvious that the partition was effected by the parties themselves, though in the presence of certain *panchayatdars* who appear to have assisted the parties with their advice as mediators. There is no indication in the document or elsewhere in the evidence that there was any submission to arbitration or that the parties intended to be bound by the decision of the *panchayatdars*. The *koorchit* therefore requires registration and, being unregistered, cannot " affect any immoveable property comprised therein " nor be received "as evidence of any transaction affecting such property." (Section 49).

It was, however, urged for the appellants that at any rate the *koorchit* evidenced a valid partition of all the outstandings due to the family. Apart from the fact

1. (1944) 2 M.L.J. 164 : I.L.R. 1945 Mad. 160 (F.B.).

that most of these debts, as appears from the evidence, consisted of mortgages of lands and stood on the same footing as the immoveable properties comprised in the document, their division cannot be regarded as a severable part of the transaction valid and operative so far as these assets are concerned. In a family partition, no part of the transaction can be separated from the rest unless it appears that the parties intended that that part should stand even though the other part should prove ineffectual. Where an instrument of partition provided that "as we have in the presence of the undermentioned panchayatdars divided into equal moieties the cash, moveables and immoveables, etc., of which we are now possessed valued at Rs. 80,000, our connection shall hereafter be only by relationship, but we shall have no monetary concern in respect of those properties," a Full Bench of this Court held that the document being unregistered could affect neither the immoveable property, nor, in the absence of any clear intention expressed therein, the moveables, the reasons given being "when there is an entire contract and part of it cannot be enforced, the whole goes, whereas it is otherwise when an instrument contains two or more distinct contracts in which case they are severable." *Pothi Naicken* v. *Naganna Naicker*[1]. That decision governs the present case on this point. *Perumal Ammal* v. *Perumal Naicker*[2], where an unregistered gift deed comprising moveable and immoveable properties was held good in respect of the moveables is distinguishable. The gift of the moveables was considered severable as there was no reason to suppose that the donor intended it to fail even if the gift proved inoperative as to the immoveable properties. On the other hand, *Samuvier* v. *Ramasubbier*[3], where a division of partnership assets consisting of moveables and immoveables was held to fail in its entirety for want of registration furnishes a closer analogy.

It was next suggested that the concluding declaration that all the family properties had been divided and that there were no more properties, debts or cash left to be thereafter divided was admissible to prove the appellant's case that there was a complete partition in 1928. The suggestion is clearly untenable for that would be admitting the document as evidence of the partition, which is exactly what is prohibited under section 49, clause (*c*).

Lastly, it was contended that the document was admissible to prove the adverse character of the first defendant's possession of the lands which were allotted to him under the *koorchit* though such allotment was ineffectual for want of registration. This contention must be accepted, as it is supported by numerous decisions (vide *Appanna* v. *Venkatasami*[4], *Kandaswami* v. *Ponnuswami*[5], purporting to be based on the Privy Council ruling in *Varada Pillai* v. *Jeevaratnammal*[6]. An attempt was made on behalf of the respondents to show that, on a close examination of the decision of their Lordships, it lends no support to the view expressed in those cases but, as pointed out by Sir Dinshaw Mulla in his commentaries on the Registration Act, that view has been accepted by almost all the High Courts in India, and we do not feel disposed to refer the point to a Full Bench as we were invited to do especially as the point is of no more than academic interest on the facts of this case.

The plaintiff has put forward two answers to the above contention. In the first place it is said that even if the first defendant's possession be taken to have been adverse to the plaintiff from the date of the *koorchit*, *viz.*, the 26th September, 1928, the suit having been brought within the period of limitation, the appellant's exclusive title has not become perfected. As already stated, the suit was originally instituted in the Court of the District Munsiff, Arni, on the 23rd September, 1940, *i.e.*, just three days before the expiry of twelve years. The plaint was ordered to be returned on the 23rd January, 1943, for presentation to the proper Court, as the suit was found on objection taken by the defendants, to be beyond the pecuniary jurisdiction of that Court. The plaintiff, however, took back the plaint from that

1. (1915) 30 M.L.J. 62 (F.B.).
2. (1920) 40 M.L.J. 25 : I.L.R. 44 Mad. 196.
3. (1931) 60 M.L.J. 527 : I.L.R. 55 Mad. 72.
4. (1923) 45 M.L.J. 667 : I.L.R. 47 Mad. 203.
5. A.I.R. 1929 Mad. 16.
6. (1919) 38 M.L.J. 313 : L.R. 46 I.A. 285 : I.L.R. 43 Mad. 244 (P.C.).

Court only on the 27th January, and re-presented it in the proper Court, *viz.*, the Court of the Subordinate Judge, Vellore, on the 29th January. The question is, whether, having regard to these dates, the suit can be considered to have been filed in time. The plaintiff is clearly entitled under section 14 of the Limitation Act to a deduction of the period between the 23rd September, 1940, and the 23rd January, 1943, when the plaint was ordered to be returned. Mr. Munikanniah, however, claimed that the period up to the 27th January should be excluded which no doubt would bring the suit within time. He contended that the period of exclusion under section 14 extended till the plaint was actually returned to the plaintiff, or, at any rate, till a reasonable time elapsed after it was ordered to be returned. We are unable to accept this contention. The exclusion provided for in section 14 is of " the time during which the plaintiff has been prosecuting with due diligence," the infructuous proceedings, and Explanation I to that section shows that the exclusion should cover " the day on which the proceedings therein (*i.e.*, infructuous suit or application) ended." Now Order 7, rule 10 (2), Civil Procedure Code, provides that "on returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it." Such endorsement was made in the present case on the 23rd January itself when the order was passed, and there is nothing to indicate, that it was made by the Judge in Chambers without the knowledge of the plaintiff and his pleader as was suggested. As the endorsement is an essential formality and the plaint cannot be returned before it is made, the plaintiff is, no doubt, entitled to claim exclusion of time till then. The proceedings in the former suit cannot reasonably be said to have ended before such endorsement is made. But the plaintiff is not, in our opinion, entitled to any deduction thereafter except perhaps where he can show that the Court delayed the return of the plaint in spite of his endeavour to take it back. In such cases the Bombay High Court allowed exclusion of the further period also, but it is unnecessary for us to express any concluded opinion on that point as there is no suggestion here that the plaint was not ready for return till the 27th January. The view we have expressed above finds support (*Maneklal Mansukhbhai* v. *The Suryapur Mills Co., Ltd.*[1] and *Neerendra-bhooshan Lahiri* v. *Berhampur Oil Mills, Ltd.*[2]).

Mr. Munikanniah referred to *Sinna Karuppan* v. *Muthiah Chettiar*[3], *Zafar Uddin* v. *Debi Prasad*[4] and *Muhammad Din* v. *Gurbaksh Singh*[5] as supporting his contention. On an examination of the facts of these cases it would appear that the only point decided was that the proceedings in the former suit or application could not be considered to have come to an end as soon as the Court recorded an order that the plaint should be returned. It was apparently not necessary to consider what further deduction the plaintiff was entitled to claim beyond that date. In such circumstances, observations to the effect that the period to be excluded under section 14 extends up to the date of the " actual return " of the plaint can only be regarded as loosely worded and not as laying down the proposition that whatever time the plaintiff allows to elapse before he actually takes back the plaint should also be excluded, for that would be allowing him to take advantage of his own delay. It follows therefore that the first defendant's possession must be held to have been sufficiently long to found a title by prescription if it was really exclusive and advese to the plaintiff, which it would be if the extra allotments which the *koorchit* purports to make in his favour were intended to be real and not merely fictitious and colourable. This brings us to the other answer of the plaintiff to the plea of adverse possession.

Mr. Munikanniah urged that the said allotments under the *koorchit* were merely make-believe, being part of a scheme to put the family properties (except those at Oorkudi which were then divided in order to lend an appearance of reality to the whole transaction) out of the reach of the third defendant's creditors. The *koorchit*

1. (1927) I.L.R. 52 Bom. 477 at 490.
2. (1933) I.L.R. 60 Cal. 1122 at 1128.
3. (1925) 22 L.W. 816.
4. I.L.R. (1939) All. 709.
5. A.I.R. 1933 Lah. 611.

having been excluded from the record altogether, the evidence adduced at the trial makes no specific reference to it but, as we have already observed, such evidence leaves no room for doubt that the extra properties and outstandings then left in the hands of the first defendant could not have been intended to be taken by him exclusively for his share. It will be recalled that, in addition to the 3 acres 56 cents. of nanja and about 8 acres of punja lands and outstandings of the value of about Rs. 5,000 which the first defendant got just like the other sharers, a whole lot of properties in Vallam and other villages, and outstandings due to the family amounting to Rs. 27,900 (which exceeded those allotted to the shares of all the branches put together) were left in the hands of the first defendant. It was most improbable that this disproportionately large extent of family property could have been allotted to his share. Conscious that this striking disparity needed explanation, the first defendant attempted to make out that all except the Oorkudi properties were his self-acquisition, and that he gave to each of his brothers some of the outstandings as a matter of grace. But this case, as already stated, broke down completely at the trial when the first defendant was compelled to admit that they were all family properties. As regards the lands purchased by him in 1919 from Thoddappa Naidu, he shuffled and prevaricated and spoke of having borrowed from one Nandagopal Naidu on a promissory note for paying the purchase money and discharged that debt after 1928 with his own earnings. The learned District Judge has discredited the whole story and found that the purchase was paid for from the family funds, a finding with which we entirely agree. In such circumstances, the recitals in the *koorchit* regarding the allotment to the first defendant of the immoveable properties other than those admittedly divided between the parties can only be regarded as invented with ulterior motives, the truth being, as we have found already agreeing with the learned District Judge, that these properties along with the outstandings which were not divided were left in the management of the first defendant as before to be divided later after the troubles of the third defendant with his creditors were over. In this view no question arises of adverse possession on the part of the appellants, as to which there is no evidence apart from these recitals in the *koorchit*.

It remains only to deal with the appellant's complaint regarding the exclusion of oral evidence as to the details of the alleged complete partition of 1928. Mr. Satyanarayana Rao contended that although the *koorchit* was not receivable as evidence of the partition for want of registration, the first defendant should have been allowed to adduce oral evidence regarding the same. The argument, as we understand it, was that a partition of immoveable properties could be validly effected by oral agreement, as there was no provision in the Transfer of Property Act requiring an instrument in writing for the purpose. It was, therefore, open to the appellants to prove that all the immoveable properties and outstandings due to the family existing in 1928, other than those admittedly divided among the members were effectually allotted to the share of the first defendant, although the *koorchit* which embodied the arrangement was inoperative and inadmissible to prove the partition for want of registration. This argument overlooks section 91 of the Indian Evidence Act. It is true that a valid partition arrangement can be effected orally, but where the terms of the arrangement have been reduced to the form of a document section 91 prohibits the admission of any evidence of the terms except the document itself or secondary evidence of its contents where such evidence is admissible. Where, therefore, the instrument of partition, being unregistered, cannot be admitted as evidence of the transaction, oral evidence to prove the terms of the agreement is barred. This was held by a Full Bench of this Court in *Ramayya* v. *Achamma*[1]. Mr. Satyanarayana Rao however suggested that this ruling could not stand after the recent decision of the Privy Council in *Ram Rattan* v. *Parmanand*[2]. Our attention

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1. (1944) 2 M.L.J. 164 : I.L.R. 1945 Mad. 160 (F.B.).

2. (1946) 1 M.L.J. 295 : L.R. 73 I.A. 28 : I.L.R. 1946 Lah. 63 (P.C.).

was called to the report of the arguments of Counsel where the Full Bench case appears to have been cited to their Lordships, though there is no reference to it in their judgment. Reference was also made to a recent judgment of Somayya, J., in *Koyatti* v. *Imbichi Koya*[1] where that learned Judge, referring to a similar suggestion before him, observed :—

"The Judicial Committee did not refer to the difficulty of admitting other evidence when the transaction was admittedly reduced to writing and that writing was inadmissible either under section 35 of the Stamp Act or under sections 17 and 49 of the Registration Act. But there is no doubt that the Judicial Committee had no difficulty in finding a partition on other evidence. But whether other evidence is admissible to prove the details of the partition is still open to doubt. It is not clear whether oral evidence was accepted only in proof of the division in status or to prove the details of the partition. When the question directly arises hereafter in this Court, we may have to consider whether the Full Bench decision in *Ramayya* v. *Achamma*[2], is good law after the decision of the Judicial Committee."

We do not share the learned Judge's doubts. We are of opinion that other evidence to prove the details of the partition is inadmissible, and that the reasoning and conclusion of the Full Bench on the point is not affected by the decision of their Lordships. The Full Bench were dealing with a suit for ejectment and recovery of possession of specific properties where the plaintiff could succeed only by proving her title. The partition deed whereby those properties had been allotted to her deceased husband's share having been held to be inadmissible for want of registration, she sought to prove such allotment by other evidence; in other words, she sought to prove the terms of the partition by means of other evidence. This, it was held, she could not do, having regard to section 91 of the Evidence Act. The position, however, was different, in the case before the Judicial Committee. There, the plaintiff had sued for partition. The defence, among other things, was that the parties having separated previously " the suit in the present form does not lie." To prove the previous partition the defendant filed two memoranda which were held to constitute an instrument for partition, and, being unstamped and unregistered, inadmissible in evidence for any purpose. Their Lordships then proceeded to discuss the oral evidence prefacing the discussion with the remark that " the most important question is whether partition had been effected before the institution of the suit in December, 1939," and they found that a physical division of much of the joint property in February 1939, was established. They accordingly dismissed the suit except as regards the lands which the defendant admitted to be joint. It will thus be seen that the oral evidence considered by their Lordships was in support of the plea that, there having been a previous partition, the suit " in the present form," *i.e.*, framed as one for partition, did not lie. In other words, their Lordships considered the oral evidence to find out whether the fact of a partition prior to the suit was established. The discussion of the evidence also shows that they were considering it only from that point of view. As section 91 of the Indian Evidence Act excludes oral evidence only in proof of the terms and not of its existence as a fact, of a contract, grant or other disposition of property, no reference was made to that section in the judgment nor to the Full Bench decision which related to its applicabilty.

In the present case, the appellants sought to prove by oral evidence not the *fact* of a previous partition, for that was admitted by the plaintiff, but its terms, to show that there was a complete partition of all the family assets and liabilities and that the properties now claimed by the plaintiff to have been kept joint were allotted to the share of the first defendant. Having put forward the *koorchit* as evidencing a genuine partition and allotment of properties among the sharers, the appellants cannot be allowed to prove its terms by other evidence when the document itself is not receivable as evidence for want of registration.

In the result, the appeal fails and is dismissed with costs.

V.S. ——— *Appeal dismissed.*

1. (1946) 1 M.L.J. 454. 160 (F.B.).
2. (194_) 2 M.L.J. 164 : I.L.R. 1945 Mad.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL AND MR. JUSTICE SHAHAB-UD-DIN.

Karumuthu Thiagarayan Chettiar and others .. *Petitioners.**

Government of India Act (1935), *section* 102 (4) *and Ordinance XII of* 1946—*Prosecutions in respect of offences under rules and orders made under the Defence of India Act committed before the date when the Defence of India Act ceased to be in force—If can be continued after that date—Ordinance XII of* 1946, *if* ultra vires *the Governor-General.*

The question was whether prosecutions in respect of offences under different rules and orders made under the Defence of India Act alleged to have been committed before 30th September, 1946, and instituted before that date could be continued after that date when the Defence of India Act and the rules and orders made under it ceased to be in force by virtue of the proclamation of the Governor-General made on the 1st April, 1946, revoking the Proclamation of Emergency made under sub-section (1) of section 102 of the Government of India Act on the 3rd September, 1939. It was contended that Ordinance XII of 1946 which provided for the continuation of such proceedings was *ultra vires* the Governor-General in that it sought to continue orders made under the Defence of India Act beyond the period permitted by sub-section (4) of section 102.

Held, that the provisions of Ordinance XII of 1946 which are substantially the same as the statutory provisions which govern all repealed Acts cannot be regarded as extending the Defence of India Act and the Rules and Ordinances made under it beyond the date of their expiration any more than section 6 of the General Clauses Act extends a repealed Act beyond the date of its repeal. Further on a reasonable construction of sub-section (4) of section 102, the "things done or omitted to be done before the expiration" of the period of six months after which the proclamation has ceased to operate are things to which the law applies so that the law will continue to apply after the expiration of the period to things done or omitted to be done to which it applied before the expiration of that period. In this view, offences committed before the expiration of the six months' period can be prosecuted after the expiration of the period and proceedings instituted before the expiry of the period can be lawfully prosecuted to a conclusion. As regards prosecutions instituted under a Law or Order made under section 102 of the Government of India Act, it can hardly be doubted that they are things done under the law as well as things done before the expiration of the law. Ordinance XII of 1946 cannot be said to be *ultra vires* the Governor-General.

Petitions praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order to quash the proceedings in C. C. No. 12 of 1946, on the file of the Court of the Additional District Magistrate of Madura and in C. C. Nos. 318, 319 and 330 of 1946, on the file of the Court of the Additional First Class Magistrate of Salem and in C. C. Nos. 265 and 338 of 1946, on the file of the Court of the Additional First Class Magistrate of Salem.

Sir Alladi Krishnaswami Ayyar for *K. Subramaniam, Alladi Kuppuswami, V. V. Srinivasa Aiyangar, J. R. Gundappa Rao, T. R. Srinivasan* and *R. Desikan* for Petitioners.

The Advocate-General (*K. Rajah Aiyar*) and The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Order of the Court was made by

Happell, J.—These are petitions to quash proceedings instituted against the petitioners for offences alleged to have been committed in contravention of Rules and Ordinances made under the Defence of India Act. Sir Alladi Krishnaswami Ayyar appears for the petitioners in Crl. M. P. No. 1569 of 1946 in which the prosecution was instituted under rule 18-B, sub-clause 1 (*b*) of the Cotton Cloth and Yarn (Control) Order of 1945. The main argument has been addressed to us on this petition. Mr. V. V. Srinivasa Aiyangar appears for the petitioners in the other petitions. They relate to prosecutions under different orders, but no separate argument has been addressed to us in respect of these petitions and it is admitted that the same considerations will apply to all the petitions. It has seemed to us, convenient, therefore, to refer throughout to the Cotton Cloth and Yarn (Control) Order only on the footing that what applies to this order will apply equally to the orders in question in the other petitions. The Cotton Cloth and Yarn (Control) Order was made under sub-rule (2) of rule 81 of the rules made under the Defence of India Act. Section 1 (4) of the Defence of India Act provides that the Act "shall be in force during the continuance of the present war and for a period of

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* Crl. M. P. Nos. 1569, 1578, 1581, 1584, 1587 and 1601 of 1946. 19th November, 1946.

six months thereafter." By an Order in Council of the 20th March, 1946—the India and Burma (Termination of Emergency) Order, 1946—the end of the emergency—*i.e.*, the war—was declared to be the 1st of April, 1946; and on the 1st day of April, 1946, the Governor-General by proclamation revoked the proclamation made under sub-section (1) of section 102 of the Government of India Act on the 3rd of September, 1939. Hence the Defence of India Act and the Rules and Ordinances made under it ceased to be in force from the 30th September, 1946. In all the petitions before us the offences alleged were committed and the prosecutions were instituted before the 30th of September, 1946. Notwithstanding this, the case for the petitioners is that the prosecutions cannot be continued because, after the expiration of a statute, in the absence of provision to the contrary, no proceedings can be taken on it, and proceedings already commenced *ipso facto* determine.

On the 30th March, 1946, the Governor-General promulgated Ordinance No. XII of 1946. This Ordinance is entitled the "Defence of India (Second Amendment) Ordinance, 1946. Section 2 (2) of the Ordinance commences:

"Amendment of section 1, Act XXV of 1939.—To sub-section (4) of section 1 of the Defence of India Act, 1939, the following shall be added, namely:—'but its expiry under the operation of this sub-section shall not affect—'"

and then substantially repeats in four clauses (*a*) to (*d*)—the provisions of clauses (*b*) to (*e*) of section 6 of the General Clauses Act regarding the effect of the repeal of an enactment. Clause (*d*) of sub-section (2) of section 2 of the Ordinance provides that the expiry of the Defence of India Act shall not affect:

"any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if this Act had not expired."

If Ordinance XII of 1946 is valid, it is clear that the petitioners have no case and that the proceedings against them can be lawfully continued.

Sir Alladi Krishnaswami Ayyar, however, argues that, at any rate in so far as it purports to affect prosecutions instituted under the Cotton Cloth and Yarn (Control) Order of 1945, the Ordinance is *ultra vires* the Governor-General and so not valid. This argument is based on the fact that the subjects to which the Cotton Cloth and Yarn (Control) Order applies are subjects included in the Provincial Legislative List, *i.e.*, list 2 in Schedule VII of the Government of India Act. Section 72 of Schedule IX of the Government of India Act confers on the Governor-General the power to make Ordinances in case of emergency, but the section makes no distinction as regards the exercise of the power between subjects included in the Central Legislative List and subjects included in the Provincial Legislative List. The section does, however, state that the power of making ordinances conferred on the Governor-General is subject to the like restrictions as the power of the Indian Legislature to make Laws. Now the Indian Legislature has only power to make Laws for a Province with respect to any of the matters enumerated in the Provincial Legislative List under the provisions of section 102 of the Government of India Act, and this section restricts or controls the power in two ways. First the power can only be exercised after the Governor-General has declared by Proclamation that a grave emergency exists whereby the security of India is threatened whether by war or internal disturbance; and secondly it is provided that the law shall cease to have effect on the expiration of six months after the proclamation has ceased to operate "except as respects things done or omitted to be done before the expiration of the said period." Even though the power of the Governor-General to make ordinances is neither greater nor less than, but co-extensive with, the powers of the Indian Legislature to make laws so that the power of the Governor-General to make ordinances for a Province with respect to any matter enumerated in the Provincial Legislative List is the same as that of the Indian Legislature, no difficulty arises as to the Form of the Proclamation of Emergency required to be made under

section 102, sub-section (1) of the Act. The Proclamation of Emergency of 3rd September, 1939, was promulgated under section 102, sub-section (1) of the Act. Nor is there any difficulty about the provision that a Law made under section 102 shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate. The Defence of India Act and so the Cotton Cloth and Yarn (Control) Order, made under it have ceased to have effect within the prescribed period. Sir Alladi Krishnaswami was indeed inclined to argue that Ordinance XII of 1946 is in any case *ultra vires* the Governor-General because it continues orders made under the Defence of India Act beyond the period permitted by sub-section (4) of section 102 of the Government of India Act. We do not agree. It cannot be disputed that a temporary Act may contain provisions within itself for the consequences that will ensue on its expiration; and, in our opinion, the provisions of Ordinance XII of 1946, which are substantially the same as the statutory provisions which govern all repealed Acts, cannot be regarded as extending the Defence of India Act and the Rules and Ordinances made under it beyond the date of their expiration any more than section 6 of the General Clauses Act extends a repealed Act beyond the date of its repeal. Sir Alladi Krishnaswami's principal contention is, however, that Ordinance XII of 1946 is *ultra vires* the Governor-General because Parliament has provided for the consequences of the expiration of the Defence of India Act in section 102 of the Government of India Act itself so that no provision with respect to the expiration of the Defence of India Act can be made which cannot be brought within the scope of the words "except as respects things done or omitted to be done before the expiration of the said period." It may be conceded that the provisions which can be made in respect of the termination of orders made under the Defence of India Act and relating to matters enumerated in the Provincial List are controlled by sub-section (4) of section 102 of the Government of India Act; and that being so, the validity of Sir Alladi's contention will depend on the construction of the sub-section. Before, however, we deal with this question it will be convenient to refer to two arguments advanced by the learned Advocate-General.

The learned Advocate-General does not accept the construction put on section 102 (4) of the Government of India Act by Sir Alladi Krishnaswami but he argues that in any case the prosecutions in the petitions before us can be lawfully continued because the powers of the Governor-General to make ordinances are in fact greater than the power of the Indian Legislature to make Laws and because Ordinance XII of 1946 should be regarded as a separate ordinance which is still in force and did not expire with the Defence of India Act on 30th September, 1946. We are unable to accept either of these contentions. With regard to the first contention in *King-Emperor* v. *Benoari Lal Sarma*[1], Lord Simon said:

> "On September 3rd, 1939, the date on which war was proclaimed between His Majesty and Germany, the Governor-General acting under section 102 of the Government of India Act, 1935, had proclaimed that 'a grave emergency exists whereby the security of India is threatened by war,' and thereupon the Indian Legislature acquired power to make laws for a Province with respect to any of the matters enumerated in the 'Provincial Legislative List', with the result that the Governor-General, acting under paragraph 72 of the 9th Schedule, had in case of emergency the same width of legislative power."

This is a clear statement by the Highest authority in regard to the relative powers of the Governor-General and the Indian Legislature to legislate for provincial subj cts in case of emergency, and its force is not diminished by the fact that the question of those powers was not in controversy in the case in which the statement occurs. It may also be pointed out that the India and Burma (Emergency Provisions) Act, 1940, treats the powers of the Indian Legislature to make laws and of the Governor-General to make ordinances as co-extensive in the absence of express provision to the contrary. Section 1, sub-section (3) of that Act confers on the Governor-General power to make ordinances in respect of certain subjects:

1. (1945) 1 M.L.J. 76 : L.R. 72 I.A. 57 : 1945 F.L.J. 1 (P.C).

"notwithstanding the provision of the said section 72 that the power of making Ordinances thereunder is subject to the like restrictions as the powers of the Indian Legislature to make laws."

As regards the second contention no doubt an ordinance promulgated by the Governor-General before the 1st of April, 1946, is, by virtue of the provisions of the India and Burma (Emergency Provisions) Act, 1940, not restricted to six months but will continue to have effect for the period provided in the Ordinance or, if no period is provided, until the emergency is declared by the Governor-General to have ceased to have effect. The objection to the contention is, however, that Ordinance No. XII was not promulgated as an independent Ordinance which should continue to have effect until the emergency was declared to have ceased to exist. It was promulgated as an amendment to sub-section (1) of section 2 of the Defence of India Act, and, in our opinion, it was not intended that it should have an existence independent of the other part of the amended sub-sections or the other sections of the Act which ceased to have effect on the 1st October, 1946. The intention was, substantially, to apply to the Defence of India Act on its expiration the provisions under section 6 of the General Clauses Act which automatically apply to an Act on repeal in the absence of provisions to the contrary.

The vital question is, therefore, whether the provisions of Ordinance XII or at any rate those provisions which relate to legal proceedings taken under Orders made under section 102 of the Government of India Act, for it cannot be disputed that some of the provisions will fall within the scope of the words "things done or omitted to be done," are *ultra vires* the Governor-General by reason of the terms of section 102 (4) of the Government of India Act. Sir Alladi Krishnaswami Aiyar asks why Ordinance No. XII should have been promulgated at all if criminal proceedings instituted under an Ordinance made under the Defence of India Act with respect to subjects included in the Provincial Legislative List could be continued after the expiration of the Government of India Act under the terms of section 102 (4) of the Government of India Act itself; and why, if it was intended that provision should be made in respect of the expiration of a law made under section 102 (4) similar to the provisions of section 6 of the General Clauses Act or section 38 (1) of the English Interpretation Act, the whole of these provisions should not have been included instead of only the words "things done or omitted to be done." Whether Ordinance No. XII was necessary or unnecessary cannot affect the question of the construction of section 102 (4), but it may be pointed out that the Defence of India Act and the rules made under it cover matters enumerated in the Central as well as the Provincial Legislative List and to matters enumerated in the Central Legislative List, section 102 (4) of the Government of India Act will not apply. As regards the second question it seems to us that elaborate provisions with respect to the effect of the expiration of a law made under section 102 would have been out of place. The section gives authority to the Indian Legislature to make laws in respect of Provincial subjects in certain circumstances and the law itself is the place where provision might be expected to be made to govern the effect of its expiration. Moreover section 6 of the General Clauses Act and section 38 (1) of the English Interpretation Act relate to repealed Acts and not to temporary Acts which have expired by efflux of time.

We turn, therefore, to an examination of the meaning of the words in section 102 (4) of the Government of India Act that:

"A law......shall cease to have effect on the expiration of a period of six months after the proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period."

In this connection Sir Alladi Krishnaswami has referred us to the case of *Shib Shankar Lal* v. *Soni Ram*[1]. In that case the question arose, among other things, whether an acknowledgment of liability was a thing done in pursuance of an Act of the Legislature within the meaning of section 6 of the General Clauses Act of 1868

1, (1909) I.L.R. 32 All. 33 at 43.

and it was held that it was not. This decision was confirmed by the Privy Council in *Soni Ram* v. *Kanhaiya Lal*[1]. Sir Alladi Krishnaswami argues that an offence committed in contravention of an Act is no more a thing done under or in pursuance of the Act than an acknowledgment of liability is a thing done under the Act. The decisions in the Allahabad cases relating to the construction of an Indian Statute will not of course apply to the construction of an English Act; but in any case the argument seems to us to assume, without justification, that provisions appearing in section 6 of the General Clauses Act or in section 38 of the English Interpretation Act have been adopted in sub-section (4) of section 102 of the Government of India Act. As we are dealing with an English Statute it is the English Interpretation Act of 1889 that must be looked at, and the argument is that the words of the saving clause in sub-section (4) of section 102 of the Government of India Act are substantially the same as those contained in the second part of clause (*b*) of sub-section (2) of section 38 of the Interpretation Act which are that the repeal shall not affect "anything duly done or suffered under any enactment so repealed." Now, as we have already pointed out we are concerned in these cases with an Act and orders made under the Act which have expired and not with an Act and orders which have been repealed. A Statute which is repealed, in the absence of provision to the contrary, becomes as if it had never existed, but in the case of a temporary Statute the restriction imposed and the duration of its provisions after the expiration of the Statute are matters of construction. (*Vide* Halsbury Laws of England, 2nd Edition, Lord Hailsham, Vol. XXXI, p. 513, sec. 668). It might, therefore, be expected that, if it was the intention of Parliament to adopt in respect of an Act and orders which had expired one only of the provisions of section 38 of the Interpretation Act which affect the provisions of repealed Acts while excluding the other provisions, it would have been made clear that this was its intention or that at least the precise words of the second part of clause (*b*) of sub-section (2) of section 38 of the Interpretation Act would have been employed. The words used in sub-section (4) of section 102 are, however, very different. They are that a law made under section 102

"shall cease to have effect on the expiration of a period of six months after the proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period".

In our opinion these words should be construed in their own context and we see no reason why they should be construed with reference to clause (*b*) of sub-section (2) of section 38 of the Interpretation Act. Once any presumption in favour of a construction with reference to section 38 of the Interpretation Act is removed there seems to us no real difficulty. It would be highly unreasonable to suppose that Parliament intended, while giving power to the Indian Legislature to make laws for Provinces in respect of Provincial subjects in the event of the security of India being threatened by War or internal disturbance, that offences in contravention of such laws should go unpunished unless the punishments had been inflicted before the expiration of the law or that prosecutions instituted should lapse with the expiration of the law; and, in our opinion, a construction of sub-section (4) of section 102 according to the ordinary meaning of the words used does not lead to so unreasonable a conclusion. The "things done or omitted to be done" are not stated to be "things done or omitted to be done" "under a law". They are stated to be things done or omitted to be done before the expiration of the law. As regards these things sub-section (4) provides that the law shall continue to have effect after the period when with respect to other things the law has expired; and it seems to us, on a reasonable construction, that the things done or omitted to be done before the expiration of the period of six months after which the proclamation has ceased to operate are things to which the law applies so that the law will continue to apply after the expiration of the period to things done or omitted to be done to which it applied before the expiration of the period. This construction is in accordance with what may be presumed to have been the intention of Parliament and does

1. (1913) 25 M.L.J. 131 : L.R. 40 I.A. 74 : I.L.R. 35 All. 227 (P.C.)

no violence to the ordinary meaning of the words used. In this view offences committed before the expiration of the six months' period can be prosecuted after the expiration of the period and proceedings instituted before the expiry of the period can be lawfully prosecuted to a conclusion. As regards prosecutions instituted under a Law or Order made under section 102 of the Government of India Act, indeed, it can hardly be doubted that they are things done under the Law as well as things done before the expiration of the Law. The particular prosecutions with which we are now concerned could only have been instituted under the several orders under which they purport to have been instituted.

The learned Advocate-General argued that, even if the construction put on sub-section (4) of section 102 of the Government of India Act by Sir Alladi Krishnaswami was accepted, the continuation of the prosecution was lawful by reason of the provisions of the India (Central Government and Legislature) Act of 1946 and Ordinances 18 and 20 made under it. In the view we have taken of the petitions it is unnecessary to consider this contention.

The petitions are dismissed.

A certificate under section 205 of the Government of India Act is granted in respect of all the petitions.

V.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Chengalraya Chetty .. *Petitioner**

v.

The Official Receiver, North Arcot .. *Respondent.*}

Provincial Insolvency Act (V of 1920), section 34 (1) & (2)—Claim in respect of decree debt payable by insolvent but paid by claimant—Claim, if a debt provable in insolvency.

The claim of a creditor tendering proof of his debt was made in respect of an amount which the creditor paid to discharge a decree which was passed against the claimant, the insolvent, and another. The petitioner claimed that though the decree ran against three persons it was only the insolvent that was really liable and that he, the petitioners, having paid the entire decree amount was entitled to recover the same from the insolvent. On a contention that the debt was not a provable debt,

Held, that assuming that the petitioner's claim was by way of contribution it did not fall within either category mentioned in sub-section (1) of section 34 of the Provincial Insolvency Act. It cannot be said that the value of the debt is incapable of being fairly estimated. It certainly is not a demand in the nature of unliquidated damages. The claim in contribution is not a claim in damages. The claim of the petitioner is not a debt which is not provable under the Act.

Petition under section 75 (1) of Act V of 1920 praying that the High Court will be pleased to revise the order of the District Court of North Arcot dated 20th July, 1945, in C. M. A. No. 18 of 1945 (I. A. No. 828 of 1944 in I. P. No. 5 of 1934, Sub Court, Vellore).

S. V. Venugopalachari for Petitioner.

M. Natesan for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition arises in the insolvency of one Fakir Sahib. The petitioner is one of the creditors of the insolvent. He tendered proof of his claim which was rejected by the Official Receiver and he thereupon applied under section 33 of the Provincial Insolvency Act V of 1920 to the Court to accept proof of his debt. Though the Official Receiver refused to contest the petition the learned Subordinate Judge held that the claim of the petitioner could not be proved in insolvency because it was a claim by way of contribution and therefore was not provable under section 34 of the Insolvency Act. On appeal the learned District Judge confirmed the order of the learned Subordinate Judge.

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*C.R.P. No. 1040 of 1945. 10th December, 1946.

He held that the claim made for contribution cannot be said to be a liquidated claim within the meaning of section 34 of the Provincial Insolvency Act.

The claim is made in respect of an amount which the petitioner paid to discharge a decree in O. S. No. 464 of 1931 on the file of the Court of the District Munsiff, Tiruppattur which was passed against the petitioner, the insolvent and another. The decree was that these three persons should pay the plaintiff therein Rs. 250 on account of past mesne profits and mesne profits at the same rate from the date of the plaint till the date of delivery. The petitioner claims that though the decree ran against all the three persons it was only the insolvent who was really liable and he having paid the entire decree amount was entitled to recover the same from the insolvent. In the counter affidavit filed by the insolvent it was alleged that the application was not maintainable, that the debt was not a provable debt and that the remedy was only by way of suit.

Section 34 (1) of the Provincial Insolvency Act is as follows :—

> "Debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be provable under this Act."

In my opinion assuming that the petitioner's claim is by way of contribution it does not fall within either category mentioned in the above sub-section. It cannot be said that the value of the debt is incapable of being fairly estimated. As a matter of fact there is no question of any estimation. The petitioner's claim is that the debt consists of the entire amount paid by him. It certainly is not a demand in the nature of unliquidated damages. The claim in contribution is not a claim in damages. Mr. Venugopalachari, the learned advocate for the petitioners drew my attention to the decision in *Wolmershausen* v. *Gullick*[1], in which it was held that the liability of a bankrupt co-surety to contribution, though unascertained at the time of the bankruptcy proceedings is a debt provable in the bankruptcy. The decision in *Gangadhar* v. *Kanhai*[2], proceeds also on the same view. Sub-section (2) of section 34 of the Provincial Insolvency Act provides :

> "that all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act."

I have no hesitation in holding that the claim of the petitioner is not a debt which is not provable under this Act. The entire argument of the learned advocate for the Official Receiver has proceeded as if the insolvency Court is now being called upon to ascertain the mesne profits. Mesne profits no doubt are in the nature of damages but the Court is not now called upon to ascertain mesne profits. That has been done before and there is a decree for a certain sum. I fail to see the applicability of the ruling in *Siva Panda* v. *Jujusti Panda*[3] and *Basanta Kumar Basu* v. *Ramshanker Ray*[4] which were cited by the learned advocate for the respondent. He did not address any argument on the only question which arises in this case, namely whether the claim for contribution can be held to be a claim in the nature of unliquidated "damages."

It was not contended before either of the Courts below that the plaintiff's claim was not sustainable on the merits.

I therefore set aside the orders of the Courts below and grant the application filed by the petitioner under section 33 of the Provincial Insolvency Act with costs throughout.

V.P.S. ——— *Petition allowed.*

1. (1893) 2 Ch.D. 514.
2. (1928) I.L.R. 50 All. 606.
3. (1901) 12 M.L.J. 13 : I.L.R. 25 Mad. 599.
4. (1931) I.L.R. 59 Cal. 859.

Appeal against the order dated 21st December, 1944, of the Court of the Subordinate Judge of Devakottai, and made in E. P. No. 126 of 1944, in O. S. No. 122 of 1931.

T. V. Muthukrishna Aiyar, B. C. Seshachala Aiyar and *T. S. Nagaswami Aiyar* for Appellant.

R. Kesava Aiyangar and *S. R. Krishnamacharya* for Respondent.

The Judgment of the Court was delivered by

Horwill, J.—This is an appeal against the order of the Subordinate Judge of Devakottai ordering execution of the decree in O. S. No. 122 of 1931 on an application, E. P. No. 126 of 1944, overruling the objection of the appellant to its executability against the property against which the decree-holder now seeks to execute his decree.

The lower Court overruled the objections of the appellant on the ground that he could and should have raised his objections in E. A. No. 638 of 1940, a petition to add the present appellant and his brothers as legal representatives of their deceased father, the first defendant in the suit, and to transmit the decree to the Court of the District Munsiff of Tiruvannamalai for concurrent execution. It is conceded by Mr. Muthukrishna Aiyar on behalf of the appellant, that in an application to transmit, a judgment-debtor must raise any objections he has to the general executability of the decree. He must, for example, plead discharge, or, if the decree is not executable on the ground that the Official Receiver has not been brought on record, that objection too must be taken. It is also conceded by Mr. Kesava Aiyangar for the respondent that in an application for transmission it is not necessary for the judgment-debtor to object to the executability of the decree against a particular item of property; because that would not be a valid objection to the transmission of the decree. The transmitting Court would naturally say that such objection could be considered when an execution petition had been filed to execute the decree against that particular property. It would not be a question to be discussed and decided in an application for transmission.

The objections taken by the appellant were (1) that the petition was not maintainable for want of leave of the insolvency Court; (2) that by reason of the discharge order, his liability became extinguished, and (3) that the Official Receiver had disposed of the one-fourth share of the first defendant and the one-fourth share of the appellant and that the land was therefore no longer available for execution. He also raised an objection as to limitation which, it is now admitted here, has no substance. Of the other objections raised, the objection as to non-maintainability for want of leave of the insolvency Court and the objection that the liability had become extinguished by reason of the discharge order were objections that could and should have been taken in the application for transmission of the decree to the Court of the District Munsiff of Tiruvannamalai; and the appellant was therefore precluded from raising them in the lower Court.

There remains the objection that the decree cannot be executed against the particular property because the Official Receiver had already disposed of the shares of the appellant and his father. That was not a question that had necessarily to be raised in the application to transmit the decree, and therefore the appellant is not precluded from raising this objection in this petition. It however seems to us that there is no substance in this objection, and that it is unnecessary to allow the appeal on this ground. If the appellant has no interest in these properties, as he alleges, then he can raise no objection to the sale of these properties. If the transfers in favour of the Official Receiver were not valid and he has still an interest in the properties, then his interest is available for execution in these proceedings.

The appeal is dismissed with half the costs of the respondent.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE BELL.

Murkothkandiyil Muyyarikkandi Kalander and others .. *Appellants**

v.

Thattantavita Vatakkayil Muyyanikandi Kunhipakki .. *Respondent.*

Suits Valuation Act (VII of 1877), section 4—Suit for partition—Relief as to recovery of half share in property—Valuation for purposes of jurisdiction.

For purposes of jurisdiction it is the plaintiff's interest in the property that must be valued. Where the suit was for partition and the plaintiffs sought to have their undivided half share in the suit properties converted into a divided half share,

Held, that value of the suit for purposes of jurisdiction was the plaintiffs' half share in the suit properties.

Appeal against the order of the Court of the Subordinate Judge of Tellicherry, dated 29th September, 1944, and made in O. S. No. 50 of 1944.

P. Govinda Menon for Appellants.

K. Kuttikrishna Menon for Respondent.

The Judgment of the Court was delivered by

Horwill, J.—The question that arises in this appeal is whether the lower Court was right in valuing the parambas which were the subject of the suit under section 7, clause (v) (*b*) of the Court-Fees Act and calculating the value of the suit for purposes of jurisdiction on the half share of the suit properties comprising parambas, building, garden, etc., claimed by the plaintiffs.

The main question is whether jurisdiction should be determined by valuing the whole of the plaint schedule properties or only the half share which the plaintiffs claim as theirs.

Section 4 of the Suits Valuation Act says :

"Where a suit relates to land or an interest in land.........the amount at which for purposes of jurisdiction the relief sought in the suit is valued shall not exceed the value of the land or interest as determined by rules under section 3".

It is clear from this section that for purposes of jurisdiction it is the plaintiffs' interest in the property that must be valued. The plaintiffs' suit was for partition of their half share in the suit properties. In other words, they asked that their undivided half share in the properties should be converted into a divided half share. This relief could not be valued; and court-fee had to be calculated according to the provisions of Article 17 of Schedule II of the Court-fees Act. The matter in dispute in the suit was however whether the plaintiffs had a half share in the plaint schedule properties or not. According to their claim, they had an undivided half share in the suit properties, which they sought to have divided ; and so it seems clear to us that the suit related only to a half share of the plaint schedule properties.

The value of a partition suit has been considered on many occasions by this Court, but it is unnecessary to refer to those decisions for the matter came up for consideration by the Privy Council recently in *Bai Shavanti Bai* v. *Janarthan Raghunath Warick*[1]. Their Lordships were concerned with the valuation of an appeal sought to be preferred under section 110, Civil Procedure Code ; and they held that the value of the matter in dispute was the value of the share of the joint family property claimed by the appellant.

They said :

"It is enough for the purposes of the present case to say that their Lordships feel no doubt that a question as to the title of the plaintiff to the share which she claims in the joint property does not become a question respecting the whole of the joint family estate merely because if her title is established it would result in the joint family estate being partitioned."

*A.A.O. No. 338 of 1945. 6th December, 1946.

1. I.L.R. 1944 Bom. 745.

It is true that their Lordships were considering the value of the subject-matter of an appeal under section 110, Civil Procedure Code and not the subject-matter of the suit; but the value was there the same, as the scope of the appeal related to the whole subject-matter of the suit.

The learned Subordinate Judge also discussed the question whether the value of the parambas would have to be calculated under section 7, clause (v) of the Court-fees Act or not. It is conceded here that if the appeal fails on the first point, then section 7, clause (v) will apply; but it is argued that the sub-clause applicable is not section 7, clause (v) (*b*), according to which the value would be ten times the land assessment, but section 7, clause (v) (*c*) or (*e*). In the first case, the value would be calculated at fifteen times the net profits or according to the market value of similar land in the neighbourhood. It is contended that the suit should be valued under section 7, clause (v) (*e*) because the paramba has a house standing upon it. We however, find that the question as to the sub-clause of section 7, clause (v) applicable was not discussed in the lower Court, the arguments there proceeding on the basis that if section 7, clause (v) applied, then the value of the parambas would be calculated at ten times the rent. Even in the grounds of appeal we find no reference to the point now sought to be raised. It cannot therefore be allowed to be argued in this Court.

The appeal is dismissed with costs.

B.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAMANNAR.

D. Shanmugha Raja, Proprietor of Sivaganga Estate, being minor, represented by Dewan Bahadur V. Ponnuswami Pillai, Manager, Sivaganga Estate .. *Appellant**

v.

A. R. M. Suppiah Servai and others .. *Respondents.*

Madras Forest Act (V of 1882), *sections* 26 *and* 32—*Notification under section* 32 *extending provisions of section* 26 *to forests in Zamindari—Proprietary right of Zamindar to such forests, if affected—Suit by Zamindar for declaration of title to such forests and for a permanent injunction to restrain defendants from interfering with his possession and enjoyment—Maintainability—Madras Preservation of Private Forests Act (XVIII of* 1946)—*Applicability to such forests in 'estates' as defined in the Madras Estates Land Act.*

There is nothing in the provisions of the Madras Forest Act or in the rules framed thereunder, which takes away the proprietary right of a Zamindar to forests in his estate to which the provision of the Madras Forest Act have been made applicable by notifications thereunder.

Where at the desire of the Zamindar the Provincial Government extends the provisions of section 26 of the Madras Forest Act to the forests and waste lands in his estate and issues a notification under section 32 of the Act declaring such forests to be "Reserved forests," such forests and waste lands do not thereupon become the property of the Government. As such, the Zamindar can maintain a suit for a declaration that such forests and waste lands belong to him and are in his enjoyment and for an injunction to restrain the defendants from interfering with his possession and enjoyment of those forests and waste lands. Neither the Government nor the forest officer could maintain a suit for a declaration of title and ownership as regards those forests.

Madras Preservation of Private Forests Act (XVIII of 1946) does not apply to reserved forests constituted under the Madras Forest Act in respect of forests situated in 'estates' as defined in the Madras Estates Land Act.

Appeal against the decree of the Court of the Subordinate Judge, Devakottai, in A. S. No. 48 of 1944, preferred against the decree of the Court of the District Munsiff, Devakottai in O. S. No. 82 of 1942.

K. Kuttikrishna Menon for Appellant.

M.S. Vaidyanatha Aiyar for Respondents.

JUDGMENT.—The plaintiff who is the appellant is the proprietor of the Sivaganga Estate represented by his manager. He sued for a declaration that the property,

*S.A. No. 1133 of 1945 and 9th December, 1946.
C.M.P. Nos. 3552, 3553 and 5682 of 1945.

described in the schedule to the plaint, situated in Oorawayal village belonged to him and was in his enjoyment, for a permanent injunction restraining the defendants from trespassing upon its limits and cutting off the trees therein and for damages and other reliefs. He alleged that the village was situate in his estate and that the tank and forest of the village belonged to the estate. In paragraph 6 of his plaint, he alleged that the property described in the plaint schedule had been declared by the Government to be a "Reserved Forest" and that the Zamindar for Sivaganga had been appointed Forest Officer in respect of the said forest. The defendants denied the plaintiff's title and also took objection to the maintainability of the suit. This latter plea was contained in paragraph 11 of their written statement which runs as follows:

"If there is any truth in the allegation that the suit property is reserved forest, the suit presented by Raja Avergal is not sustainable under law. Only proceedings under the Forest Act ought to have been taken and as such the present suit cannot be entertained and it is liable to be dismissed on that ground alone."

The learned District Munsiff of Devakottai who tried the suit overruled the objection raised as regards the maintainability of the suit, found on the other questions in favour of the plaintiff and granted him a decree.

On appeal by the defendants, the learned Subordinate Judge of Devakottai without going into the merits of the case, held that the plaintiff was not entitled to claim a declaration that the property belonged to him and also found that the suit brought by him as proprietor of the Sivaganga estate was not maintainable. He accordingly dismissed the suit and the plaintiff has therefore filed the above second appeal.

The learned Government Pleader who appeared for the appellant contended that there is nothing in the provisions of the Forest Act or in the rules framed thereunder which takes away the proprietary right of the zamindar to forests to which the provisions of the Forest Act have been made applicable by notifications thereunder. I entirely agree with him.

The learned advocate for the respondents tried to maintain the position that after the issue of a notification under the Madras Forest Act, the Zamindar as zamindar ceased to have the right to the possession and management of the suit forest and that he was not entitled to maintain a suit as a zamindar and as owner.

My attention has been drawn to Notification No. 452 dated 22nd June, 1937, under which the Provincial Government extended the provisions of section 26 of the Forest Act to the forests and waste lands in the Estate of Sivaganga. This was done at the desire of the Zamindar. The power to extend the provisions of the Forest Act to lands which do not belong to Government is contained in section 32 of the Act. Under that section, the owner of any land may, with a view to the formation or conservation of forests thereon, represent in writing to the Collector his desire, *inter alia*, that all or any of the provisions of this Act or rules made thereunder be applied to such land and the Government may in any such case, by notification, apply to such land such provisions of this Act as it thinks suitable to the circumstances thereof and as may be desired by the applicant. It is clear from the notification No. 452 that what the Zamindar desired the Government to do was to extend the provisions of section 26 of the Act to the forests and waste lands in his estate. Section 26 confers on the Provincial Government the power to regulate the use of the pasturage or of the natural produce of land and to make rules with respect to such land regulating or prohibiting the clearing or breaking up of land for cultivation and otherwise regulating the use of such land consistent with the objects of the Act. The Provincial Government may also by rules prescribe penalties for infringement of the rules. After extending the provisions of section 26 to the forests and waste lands in the Sivaganga Estate by notification No. 452 the Government issued another notification No. 453, under which they made rules to regulate the management of the forests and waste lands in the Sivaganga Estate. The first of the rules is as follows:

"These rules shall be subject to all rights legally vested in any individual or community on the date of their publication."

Under rule 2, forests and waste lands in the Sivaganga Estate and at the disposal of the Zamindar thereof shall, for the purpose of these rules, be classified into reserved lands and unreserved lands. There are rules making due provision for the safeguarding of the forest produce and for the preservation of the forests, with which we are not concerned. It will suffice if we refer to rule 3, under which it shall be unlawful for any person to fell, remove, girdle, mark, lop, etc., or otherwise damage, any tree, or remove any forest produce unless he is authorised to do so by the Collector or by some one duly authorised by him to grant such permission. The Collector is given several powers under these rules in the management of the forests and waste lands. Rule 7, sub-rule 3, provides that reserved trees shall not be felled or otherwise interfered with except on a permit granted by the Forest Officer or an official of the Estate authorised by the Collector in this behalf. By rule 13, a provision is made for punishment of those who infringe the rules. The last rule No. 15, says:

"In the above rules, the expression 'forest officer' means the Zamindar of the Sivaganga Estate."

The learned advocate for the respondent contended that by reason of the notification, the Zamindar was not entitled to maintain the suit as Zamindar. He attempted to support his argument by referring to cases which lay down that a lessor cannot before the termination of the lease granted by him sue to eject a trespasser from the demised property. He cited *Ramanadan Chetti* v. *Pulikutti Servai*[1] and *Mohideen Ravuther* v. *Jayarama Iyer*[2]. I am unable to see the bearing of these cases or the proposition of law which was enunciated therein, on this case. The fact that large powers have been granted by the notification to the Collector for regulating the management of the forest does not mean that either the ownership or the legal right of the Zamindar to possession has been taken away. In any event having regard to the fact that this suit is not a suit to eject the defendants there is no room for an application even by analogy of the principle laid down in these cases.

The first prayer in the plaint is for a declaration that the property described as S. No. 2 in Ooravayal village, belongs to and is in the enjoyment of the plaintiff. I have not been referred to any provision of the Forest Act which deprives a Zamindar of his ownership of forest land which has been declared by notification to be "Reserved Forest." What the Zamindar requested the Government to do was to extend the provisions of section 26 of the Forest Act to the forests and waste lands in his estate. These forests and waste lands do not become the property of the Government on the issue of a notification under section 32 of the Madras Forest Act. I therefore do not see how the plaintiff as a Zamindar cannot maintain a suit for a declaration that the property belongs to him and is in his enjoyment.

It was admitted by the learned advocate for the respondents that neither the sections of the Act nor the rules framed under the Act provide for the institution of a suit by a Forest Officer as such. It is therefore difficult to understand the objection as developed in the lower Courts that the suit was not instituted by the Zamindar as a Forest Officer. The issue in the trial Court was whether the suit was not maintainable as it was not filed by the Forest Officer and in the trial Court reliance appears to have been placed for the defendants on section 56 of the Madras Forest Act. This section has obviously no application. In the lower appellate Court the argument which appears to have found favour with the learned Subordinate Judge was that the suit should fail inasmuch as the suit was not filed by the Government or under the authority and sanction of the Government or by the plaintiff in his capacity as Forest Officer. I have not been shown any provision

1. (1898) 8 M.L.J. 121 : I.L.R. 21 Mad. 288. 2. (1920) 40 M.L.J. 38 : I.L.R. 44 Mad. 937.

under which either the Government or the Forest Officer as such could maintain a suit for a declaration of title and ownership as regards forest lands in the estate.

In this case it is not as if the defendants pleaded that their action was justified on account of any permission granted by the Collector under the rules made by the notification, Ex. P-2. There is no conflict in this case between the powers of the Collector under the notification and the rights of the Zamindar as the proprietor of the estate in which the forests are situate. In such circumstances it is impossible for me to accept the contention on behalf of the respondents that the suit is not maintainable.

My attention was drawn to the provisions of Madras Act XVIII of 1946 which received the assent of His Excellency the Governor-General on 20th October, 1946. Under section 5 all suits, proceedings in execution of decrees or orders and other proceedings by way of appeal or revision in which a claim to customary or prescriptive rights in forest is involved, ... which are pending at the commencement of this Act . . . . . shall stand stayed and shall not be proceeded with until after the expiration of this Act. I am clearly of opinion that the provisions of this Act do not apply to the present case for two reasons: (1) this is not a case in which a claim to customary or prescriptive rights in a forest is involved; and (2) the Act itself does not apply to reserved forests constituted under the Madras Forest Act of 1882. The learned advocate for the respondents contended that the words "but does not apply to reserved forests constituted under the Madras Forests Act, 1882" are only an exception to sub-clause (*iii*) of sub-section (2) of section 1, *i.e.*, to private forests situated in other areas in the Province of Madras and having a contiguous area exceeding 100 acres which may be declared by the Provincial Government to be forests for the purposes of this Act by notification in the *Fort St. George Gazette*. It is clear from the terms of the sub-clause that the contention is without any substance. Sub-clause (*iii*) refers to private forests which will be declared by the Provincial Government to be forests for purposes of the Act by notification in the *Fort St. George Gazette*. There is no point in saying that to reserved forests among such a class of forests, the Act will not apply, because one would presume that the Government would not declare certain forests to be forests for purposes of this Act, knowing at the same time that under the proviso if they are reserved forests, the provisions of the Act will not apply. In my opinion the words "does not apply to reserved forests constituted under the Madras Forest Act, 1882," will certainly apply to sub-clause (*iii*) namely, to forests situated in estates as defined in the Madras Estates Land Act including the suit forest. For these two reasons, I hold that the hearing of this second appeal need not be stayed.

As the learned Subordinate Judge did not deal with the merits but dismissed the suit on this preliminary point, the second appeal is allowed and the case is sent back to the learned Subordinate Judge for disposal on the issues other than the issue disposed of by this Court.

Costs of the second appeal will abide the final result. Court-fee on the memorandum of appeal will be refunded. (Leave refused).

C. M. P. Nos. 3552, 3553 and 5682 of 1945.—These applications are only made for interlocutory relief till the disposal of the second appeal. They are therefore dismissed. If necessary, the plaintiff will be at liberty to make similar applications to the lower appellate Court.

V.P.S. *Appeal allowed and case remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE BELL.

Tayi Narasimha Rao, Executive Officer, Relangi and another .. *Appellants**

v.

Pasupaleti Suranna and others .. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927), section 73—Civil Procedure Code (V of 1908), sections 15 and 92—Plaintiffs appointed officers to administer temple after notification under Chapter VI-A—Claim to recover property in possession of defendants as previous trustees—Court in which the suit should be filed—Nature of suits contemplated by section 73.

A suit filed under section 73 of the Madras Hindu Religious Endowments Act related to the property of a temple in the possession of the defendants on account of their prior position as *de facto* if not *de jure* trustees of the temple before the plaintiffs were appointed in succession as officers to administer and manage the temple after notification under Chapter VI-A of the Act. The plaintiffs prayed that the properties of the temple be declared to be the endowment of the temple and be vested in the plaintiffs and also asked for an acccount of the income of the properties and to give possession of the same to the plaintiffs. On a question as to the proper Court in which the suit should be filed,

Held, (1) The suit was not a suitable one to be filed under section 73 of the Madras Hindu Religious Endowments Act and therefore the proper Court, following the principle of section 15, Civil Procedure Code, would be the Court of the lowest grade competent to try it, in this case, the Sub-Court.

(2) Section 73 of the Madras Hindu Religious Endowments Act is to the same effect as section 92 of the Civil Procedure Code and its implications and as such decisions relating to section 92, Civil Procedure Code, can usefully be employed in considering the meaning of section 73 of the Act, there being in essence no difference between the two.

Appeal against the order of the District Court, West Godavari, at Ellore, dated the 12th March, 1945, in O. S. No. 8 of 1944.

K. Subba Rao for Appellant.

P. Chandra Reddi and *K. Venkataratnam* for Respondents.

The Judgment of the Court was delivered by

Bell, J.—This appeal arises out of a decision given by the District Judge of West Godavari in O. S. No. 8 of 1944. That suit purported to be filed under section 73 of the Madras Hindu Religious Endowments Act and related to the property of the Malleswaraswami temple at Relangi. This temple was notified by Government under Chapter VI-A of the Act and the first plaintiff was duly appointed the executive officer. Later, after the suit was filed, he was replaced by the second plaintiff. The defendants are said to be in possession of the temple lands and to have been at one time prior to the appointment of the plaintiffs *de facto* if not *de jure* trustees of the temple.

The plaint asks that the entire interest in the suit land—the properties of the temple—should be declared to be the endowment of the temple and be vested in the plaintiffs. Next the plaintiffs ask for an account of the income of the property and of the expenses incurred by the defendants for the yearly kalyanam and that the defendants be ordered to pay over the moneys remaining in their hands with interest. Thirdly, the plaintiffs ask for possession of the suit property.

The first issue framed in the suit related to jurisdiction. The learned District Judge nevertheless decided to consider fully all the other issues and only at the end of his judgment to deal with the first issue. He went into this issue with great care and came to the conclusion that the suit was not a suitable one to be filed under section 73 of the Act and therefore that the proper Court should have been the Sub-Court at Narasapur, following the principle of section 15 of the Code of Civil Procedure, *viz.*, that every suit shall be instituted in the Court of the lowest grade competent to try it. It is a pity we think that he did not go on and decide the whole case himself because then the matter would have been ended once for all and it would not have been possible for the defendants to have canvassed the matter on appeal at any rate on the ground that there was want of jurisdiction. However, as the learned Judge felt bound to decide the question of jurisdiction

*A.A.O. No. 551 of 1945. 6th December, 1946.

and to decide it against the plaintiffs it is not for us or any one to criticise his scrupulousness in this regard.

The point that we have to determine is whether, in fact, this is the type of suit contemplated by section 73 of the Act. That part of the section which may be applicable is as follows :

"(1) The Board or any person having interest and having obtained the consent of the Board may institute a suit in the Court to obtain a decree for any of the following reliefs :................ (d) directing accounts and inquiries in respect of the administration or management of a math, temple or specific endowment attached to a math or temple."

Having regard to the plaint in this case sub-section (d) is the only one material. It has been said many times that section 73 of the Act is to the same effect as section 92 of the Code of Civil Procedure and its implications. Is this the type of suit contemplated by the section? In our opinion it is not. Here the plaintiffs are the duly appointed trustees of this temple. They are endeavouring to exert their right to possession; possession of the trust property—and to oust the defendants who by reason of the plaintiffs' appointment have become no more and no less than trespassers. It may be that the defendants are still endeavouring to carry out the functions as though they were still trustees and of course in so doing they will be answerable for their acts. But when the plaint uses the word "accounts" it is not that they are being asked to account since the appointment of the plaintiffs as *trustees* although of course they may be compelled to give an account of their trusteeship upto the moment when it legally expired. The plaintiffs here are not persons "having an interest" in the sense that they are members of the public who wish to see that the temple and the trust property are properly administered but they are persons who are in law bound to recover the property having been appointed trustees of it and if they do not seek to obtain possession they will be failing in their duty and committing a breach of trust. In our view the section is quite clear. It was never intended to give one claimant to the temple property, relief against another claimant, but to enable persons interested, members of the public, worshippers and the like to have an opportunity of seeing the accounts of a temple and ascertaining how efficiently or otherwise it is being managed, and in such case they may ask for a trustee to be removed and replaced by a more efficient man. They may also ask that the trust property shall vest in some particular person and get directions as to its management; but the section was never intended, as is said, to enable a person to recover his private rights.

A number of cases have been cited to us but we do not think it necessary to refer bo them in detail. One of us held in *Padmanabha Kamath* v. *Vaikunta Bhatta*[1] with regard to this section as we now hold today. From a perusal of other cases it appears to us that the decisions relating to sections 92 of the Code can usefully be employed in considering the meaning of section 73 of the Act, there being in essence no difference. In *Thirumalai Thirupathi Devasthanams Committee* v. *Krishnayya*[2] for example, the learned Chief Justice pointed out that section 92 of the Code deals merely with the procedure to be adopted in a representative suit for a relief; and that there must be an apparent necessity for a direction of the Court with regard to the administration of the trust, not as to whether A or B is the rightful trustee. In that case too, certain trustees were held to have a normal right of action to recover from other trustees certain moneys collected on behalf of the temple and that such right was entirely independent of section 92 of the Code. At page 653, the learned Chief Justice adds :

"The respondents are in law bound to deliver to the plaintiffs the moneys and offerings in kind obtained ...."

So here the defendants are bound to hand over the trust property to the plaintiffs if the plaintiffs' claim is true and it is the latter's duty to enforce delivery.

For these reasons we think that the learned District Judge came to a correct conclusion and that this appeal must be dismissed with costs.

K.C. —— *Appeal dismissed.*

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1. (1942) 2 M.L.J. 757. 2. (1943) 1 M.L.J. 388 : I.L.R. 1943 Mad. 619 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Dhulipalla Brahamaramba .. *Petitioner**

v.

Dhulipalla Seetharamayya and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 33, and section 149—Application for leave to sue in forma pauperis*—Death of applicant during pendency of—Right of his legal representative to be brought on record and to continue suit on payment of requisite Court-fee—Effect on limitation for the suit—Applicability of section* 149, *Civil Procedure Code to such a case.*

As an application for leave to sue *in forma pauperis* embodies a plaint, if the applicant dies during its pendency, his legal representative is entitled to be brought on record and to continue the suit on payment of the requisite Court-fee. Limitation for the suit must be deemed to have stopped on the date when the application for leave to sue *in forma pauperis* was filed. Here, section 149, Civil Procedure Code would apply.

Anasuyamma v. *Subbareddi*, (1943) 2 M.L.J. 180, overruled.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Tenali, dated 11th September, 1945, in I. A. No. 662 of 1945 in O. P. No. 24 of 1944.

The Advocate-General (*K. Rajah Aiyar*) and *K. Ramaseshayya* for Petitioner.

V. Subramanyam, Ch. Raghava Rao and *K. Kotayya* for Respondents.

This petition coming on for hearing, the Court (Happell, J.) made the following

ORDER OF REFERENCE TO A BENCH (8-11-1946).—The question in this civil revision petition is whether the legal representatives of a plaintiff who dies during the pendency of an application to be permitted to sue *in forma pauperis* can be brought on record and allowed to prosecute the suit on payment of the requisite Court-fee. There appears to be a conflict on this question between a recent decision of Horwill, J., in *Anasuyyamma* v. *Subba Reddi*[1] and the decision of Bardswell, J., in *Duraipandiyan* v. *Solaimalai Pillai*[2]. The case will be put before the Chief Justice for orders as to its being posted before a Bench.

In pursuance of the aforesaid order of reference, the petition coming on for hearing, the Judgment of the Court was delivered by

The Chief Justice.—One Dhulipala Venkata Subba Rao and his two minor brothers, Sreedhara Rao and Butchaiya, filed an application in the Court of the Subordinate Judge, Tenali, asking to be allowed to sue *in forma pauperis* for a decree for the partition of immoveable property. The application complied with all the requirements of the Code of Civil Procedure with regard to a plaint. The document was in form and substance a plaint, coupled with a prayer to be allowed to sue without payment of the Court-fee. Before the Court had time to inquire into the alleged pauperism of the petitioner, Dhulipala Venkata Subba Rao died. Thereupon, his mother, the petitioner now before us, applied to be brought on the record as his legal representative and to be allowed to continue the suit in his place. She signified her willingness to pay the Court-fee. The Subordinate Judge relying on the judgment of Horwill, J., in *Anasuyamma* v. *Subba Reddi*[1] dismissed the application. The petitioner then asked this Court to set aside the order of the Subordinate Judge in the exercise of its revisional powers. In the first instance the matter came before Happell, J., who referred it to a Bench for decision. In his order of reference the learned Judge pointed out that the decision of Horwill, J., was in conflict with the judgment of Bardswell, J., in *Duraipandiya* v. *Solaimalai Pillai*[2].

It follows from what we have said that the question involved is whether the legal representative of a person who dies during the pendency of an application to be

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* C. R. P. No. 1429 of 1945. 12th December, 1946.

1. (1943) 2 M.L.J. 180.

2. (1934) 67 M.L.J. 332 : I.L.R. 58 Mad. 169.

allowed to sue *in forma pauperis* can be brought on the record and allowed to prosecute the suit on payment of the requisite Court-fee. The decision of the question requires the consideration, not only of the two cases referred to, but of the judgment of the Privy Council in *Stuart Skinner* v. *William Orde etc.*[1] and of other authorities. The judgment of the Privy Council in *Stuart Skinner* v. *William Orde etc.*[1] has a very important bearing on the question under discussion, but its effect has not always been properly understood. There, a person applied for leave to sue as a pauper, but pending the inquiry into his alleged pauperism he obtained funds which enabled him to pay the Court-fee. He was allowed by the Court to pay the Court fee, whereupon his petition was numbered and registered as a plaint. The Judicial Committee held that in those circumstances the suit should be deemed to have been instituted from the date when the petition to sue *in forma pauperis* was filed and that limitation ran against him only upto that time. The Code of Civil Procedure of 1859 was then in force. After referring to its provisions with regard to applications to sue *in forma pauperis* Sir Montague E. Smith, in delivering the judgment of the Board, said :

> "Therefore it" (the petition) "contains in itself all the particulars the statute requires in a plaint, and, *plus* these, a prayer that the plaintiff may be allowed to sue *in forma pauperis*."

Later in the judgment Sir Montague E. Smith said :

> "Although the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it."

There is no essential difference between an application to sue *in forma pauperis* under the present Code and an application under the Code of 1859.

It follows from what was said in the judgment in *Stuart Skinner* v. *Williams Orde etc.*[1] that such an application is in fact a plaint coupled with a prayer to be allowed to sue without payment of the required Court-fee. A plaint which does not bear the Court-fee prescribed by law, in whole or in part, can by reason of section 149 of the present Code of Civil Procedure be stamped with the permission of the Court at any stage and when this is done the document has the same force and effect as if the fee had been paid in the first instance. There were no such provisions in the earlier Codes.

Order XXXIII, rule 15 of the Code now in force provides that an order refusing to allow the applicant to sue as a pauper shall be a bar to a subsequent application of the same nature in respect of the same right to sue, but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of the right claimed, provided he pays the costs, if any, incurred by the Provincial Government and by the opposite party opposing the application for leave to sue as a pauper. It has always been the practice of this Court, when an application to sue *in forma pauperis* has been refused, to allow the applicant to pay the requisite Court-fee within a stipulated period and on payment of the Court-fee within the time allowed to regard the suit as having been instituted on the date on which the application for leave to sue *in forma pauperis* was presented.

The nature of an application to sue *in forma pauperis* has been discussed on numerous occasions in Indian High Courts, since the present Code of Civil Procedure came into force. In *Balaguru Naidu* v. *Muthuratnam Iyer*[2] this Court (Krishnan, J.) held that an application to sue as a pauper is a combination of a plaint and an application to excuse the payment of the Court-fee on it. The Calcutta High Court gave a pronouncement to the same effect in *Jagadeeshwaree Debee* v. *Tinkarhi Bibi*[3] as did the Patna High Court in *Bank of Bihar, Ltd.* v. *Sri Thakur Ramchandarji Maharaj*[4].

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1. (1879) L.R. 6 I.A. 126 : I.L.R. 2 All. 241 (P.C.).
2. (1923) 46 M.L.J. 254.
3. (1935) I.L.R. 62 Cal. 711.
4. (1929) I.L.R. 9 Pat. 439.

On the other hand, two of the Judges of a Full Bench of the Allahabad High Court held in *Chunna Mal* v. *Bhagwant Kishore*[1] that an application to sue as a pauper was not a composite document, although the third Judge was of the opinion that it was. There an application for leave to sue as a pauper was refused and an application for a review of the order met with a similar fate, but the Court of first instance allowed time to the petitioner to deposit the requisite Court-fee. In revision the High Court by a majority held that when an application for leave to sue as a pauper is rejected under Order XXXIII, rule 7 (3), the Court cannot under section 149 of the Code allow the applicant to pay the requisite Court-fee and treat the application as a plaint. The majority opinion was expressed by Sulaiman, C.J., and Bennett, J. The dissentient Judge was Allsopp, J. The learned Chief Justice and Bennett, J., held, however, that when the rejection was under Order XXXIII, rule 5, time to pay the requisite Court-fee could be allowed. Sulaiman, C.J., and Bennett, J., considered that the judgment of the Privy Council in *Stuart Skinner* v. *William Orde etc.*[2] did not apply but we can see no real ground for distinction. We consider that in *Stuart Skinner* v. *William Orde etc.*[2] the Privy Council unquestionably held that an application to sue *in forma pauperis* is a composite document, a plaint coupled with a prayer to be allowed to sue without payment of Court-fee.

There are two decisions, one of this Court and one of the Bombay High Court in which interlocutory applications have been granted as in a suit during the pendency of an application to sue *in forma pauperis*. In *Chidambaram* v. *Nataraja Mudaliar*[3] Gentle, J., held that on the presentation of a petition for leave to sue *in forma pauperis* the suit should be deemed to have been instituted on that date and consequently the application for a Commissioner to take an inventory of moveable property was properly made within the meaning of Order XXXIX, rule 7 of the Code of Civil Procedure. The application was filed before there had been any inquiry into the pauperism of the applicant. In *Totaram Ichharam* v. *Dattu Mangu*[4], Beaumont, C.J., and Wassoodew, J., held that an application for the appointment of a commissioner to take an inventory of property could be filed along with a petition for leave to sue *in forma pauperis* and be dealt with by the Court under Order XXXIX, rule 7 of the Code. The learned Chief Justice said that he entertained no doubt that the plaint, whether it consisted of the original plaint, or of the petition deemed to be a plaint, took effect from the date when the plaint and the petition were presented.

We are concerned in the present case with the position when the petitioner dies during the pendency of an application for leave to sue as a pauper. Our attention has been drawn to five reported cases where this has been the position. Three of them are decisions of this Court. In *Subbiah* v. *Sundara Boyamma*[5] Srinivasa Aiyangar, J., held that where a petitioner dies during the pendency of his application for leave to sue *in forma pauperis* his legal representative is not entitled to continue the further prosecution of the petition. The basis of this decision was that the application to sue *in forma pauperis* is purely a personal relief and therefore the legal representative cannot stand in the applicant's shoes. The learned Judge was, however, careful to indicate that there was no objection to the legal representative being brought on the record if he wished to continue the proceedings as a suit by the payment of the requisite Court-fee. In *Duraipandiyan* v. *Solaimalai Pillai*[6] the sons of a deceased petitioner applied to be joined as his legal representatives and sought to proceed with the suit on payment of the requisite of the Court-fee. It was held by Bardswell, J., that this was permissible. The learned Judge's opinion coincided with that expressed by Srinivasa Aiyangar, J. This is the second of the two cases mentioned by Happell, J., in his order referring the present petition to a Bench.

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1. I.L.R. 1937 All. 22 (F.B.).
2. (1879) L.R. 6 I.A. 126 : I.L.R. 2 All. 241 (P.C.).
3. (1939) 1 M.L.J. 96.
4. I.L.R. 1943 Bom. 138.
5. (1927) 54 M.L.J. 582 : I.L.R. 51 Mad. 697.
6. (1934) 67 M.L.J. 332 : I.L.R. 58 Mad. 169.

We now come to the first case referred to in the order of reference, namely, *Anasuyamma* v. *Subba Reddi*[1]. There Horwill, J, held that the right of a legal representative was merely to file a fresh application to sue *in forma pauperis* or institute a separate suit. No reference was made in the judgment to the decision in *Duraipandiyan* v. *Solaimalai Pillai*[2]. Horwill, J, considered that on the death of the person applying for leave to sue as a pauper his application abates, and that it would not be possible for the Court to overlook the break and to regard the plaint as having been presented by the legal representative on the day when the application was originally filed. This decision is not only in conflict with the judgments in *Subbiah* v. *Sundara Boyamma*[3] and *Duraipandiyan* v. *Solaimalai Pillai*[2] but it ignores the fact that an application for leave to sue *in forma pauperis* is a plaint and that the legal representative of the applicant is entitled to enforce all the rights which he possesses. Moreover, the learned Judge also ignored the provisions of section 149 of the Code of Civil Procedure. He considered that the decision in *Subbiah* v. *Sundara Boyamma*[3] supported his view but here he overlooked the fact that Srinivasa Aiyangar, J., expressed the opinion that the legal representative could continue the suit on payment of the requisite Court-fee.

The other two cases which have reference to the position when the petitioner dies are *Mst. Bibi Marim* v. *Surajmal*[4] and *Annapurnabai* v. *Balaji Maroti*[5]. In the former case a Division Bench of the Patna High Court held that the legal representative of a deceased petitioner could continue the proceedings as a suit on payment of the requiste Court-fee. In *Annapurna Bai* v. *Balaji Maroti*[5], the Nagpur High Court expressed the same opinion and said that the legal representative was in reality substituted for the deceased party in his capacity as the plaintiff and not as one suing for exemption from payment of Court-fee.

As the application for leave to sue *in forma pauperis* embodied a plaint, we hold that the petitioner is entitled in law to be brought on record as the legal representative of Dhulipala Venkata Subba Rao and to continue the suit on payment of the requisite Court-fee. We have shown that there is ample authority to support this decision. We also hold that limitation must be deemed to have stopped on the date on which Dhulipala Venkata Subba Rao filed his application for leave to sue *in forma pauperis*. Here section 149 of the Code of Civil Procedure applies.

The application for revision is allowed and the case remanded to the Subordinate Judge to decide whether the petitioner is in fact the legal representative of Dhulipala Venkata Subba Rao. If she is, he must substitute her name for his and allow her to continue the suit on payment of the Court-fee payable in respect of his share. It may be added that the minors Sreedhara Rao and Butchaiya have already been permitted to pay the Court-fee on their shares and continue the suit in the ordinary way.

The petitioner is entitled to her costs.

V.S. *Petition allowed.*

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1. (1943) 2 M.L.J. 180.
2. (1934) 67 M.L.J. 332 : I.L.R. 58 Mad. 169.
3. (1927) 54 M.L.J. 582: I.L.R. 51 Mad. 697.
4. (1936) I.L.R. 15 Pat. 738.
5. A.I.R. 1946 Nag. 320.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Somasundaram Pillai .. *Appellant**

v.

The Provincial Government of Madras represented by the Collector of South Arcot .. *Respondent.*

Contract—Acceptance—Provisional acceptance—Effect—Bid at auction of liquor shop licences—Provisional acceptance—Withdrawal of bid, contrary to conditions of sale—Conditions of sale not having statutory force—Absence of consideration to support implied acceptance of the condition against withdrawal—Enforceability of that condition.

To have an enforceable contract there must be an offer and an unconditional acceptance. A person who makes an offer has the right of withdrawing it before acceptance, in the absence of a condition to the contrary supported by consideration. A provisional acceptance cannot in itself make a binding contract.

According to the conditions of sale prescribed by the Board of Revenue for the conduct of auction sales of liquor shop licences, the bids could only be provisionally accepted by the sale officer and actual acceptance rested with the Collector. The Collector may without either confirming or refusing to confirm the provisionally accepted bid, order the sale to be continued from the point at which it was left. Under the conditions of sale, a provisionally accepted bid 'lapsed' when a higher bid is made at the subsequent sale and accepted by the selling officer and the provisionally accepted bid could not be withdrawn before it so lapsed or before orders were passed either confirming or refusing to confirm it. It was further provided that if a bidder committed a breach of this condition, he should be liable to make good any loss suffered by the Government.

A bidder at such an auction whose bid was provisionally accepted withdrew his bid before it lapsed according to the conditions of sale and refused to take out the licence and there was a fresh sale which resulted in a loss to the Government. The original bidder who withdrew his bid sued the Provincial Government for the return of the amount paid by him as advance and for an injunction restraining the Government from suing for the recovery of the loss occasioned by the re-sale.

Held, that as it was conceded that the publication of the conditions of sale did not amount to a notification under section 69 of the Madras Abkari Act, they had no statutory force and hence in deciding the question whether the plaintiff's bid could be enforced, notwithstanding its withdrawal before acceptance, the Court could only have regard to the law of contract. The plaintiff was entitled in law to withdraw his bid as there was no consideration to support his implied acceptance of the condition of sale that once a bid had been made it could not be withdrawn except as provided in the conditions of sale. The prohibition against withdrawal had not the force of law and there was no consideration to bind the bidder down to that condition.

Appeal against the decree of the District Court of South Arcot in Appeal Suit No. 158 of 1944, preferred against the decree of the Court of the District Munsiff of Villupuram in Original Suit No. 116 of 1943.

M. S. Venkatarama Aiyar for Appellant.

The Advocate-General (*K. Rajah Aiyar*) and The Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

This second appeal coming on for hearing before the Hon'ble Mr. Justice Chandrasekhara Aiyar on Tuesday, the 29th of October, 1946, the Court (Chandrasekhara Aiyar, J.) made the following

ORDER.—The plaintiff is the appellant in this second appeal. He was a bidder at a public auction of some of the arrack shops held by the Sub-Collector of Tindivanam. His was the highest bid in respect of two of the shops. But the bids were not accepted by the Sub-Collector and the sale was ordered to be continued with the plaintiff's bids as the initial bids. No bidders came forward to bid even at the amounts offered by the plaintiff. The shops had ultimately to be sold for lower bids, with the result that there was a loss to the Government of Rs. 1,148. The plaintiff asked for the return of the amount he paid as advance and for an injunction restraining the Government from proceeding against him for the recovery of the loss. His suit was dismissed by the District Munsiff and this dismissal was upheld by the District Judge of South Arcot. Hence this second appeal.

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* S. A. No. 1852 of 1945. 11th December, 1946.

Three questions have been raised on his behalf. The first is that the notification under which the sales were held and the terms of which are fully set out in the judgment of the learned District Judge, has no application at all, because it was not a case falling under clause (*b*), rule 9, under which the Collector can postpone orders confirming or refusing to confirm the provisional acceptance of the bid, but a case where the appellant was definitely and finally told that the auction sale in respect of the shops for which he bid, was not confirmed.

Attention is drawn to the terms of the notice, Ex. D-5 (*a*). There is not much substance in this contention, not only for the reason that it was not taken in the courts below, nor even in the grounds of appeal, but also because it is easy to see from the terms of the notice read with the Collector's proceedings, Ex. D-4, that what was within the contemplation of the parties was not an absolute refusal to confirm but a non-confirmation for the time being. If an order is made postponing confirmation, it means that for the time being there is no confirmation and this is what was meant to be conveyed to the appellant. And this is obviously the reason why no such point was put forward until the ingenuity of Mr. M. S. Venkatarama Aiyar, advocate for the appellant, discovered it.

The other two points raised on behalf of the appellant deserve more consideration. The sale notification, Ex. D-3 under which the auctions were held, purports to be by the Board of Revenue. Whether this notification has, under the terms of section 69 of the Madras Abkari Act, the force of law and has to be read as part of the Act,—which is the view taken by the learned District Judge—will depend upon the further question whether under section 5 of the Act the Provincial Government has framed and published any rules prescribing the powers and duties under this Act to be exercised and performed by " abkari officers," which term includes the Board of Revenue under section 3, sub-clause (2), and conferring on the Board the power to frame rules and issue notifications under section 69. True, it may be presumed that all this was done ; but, when challenged, the steps by which the notification has acquired the force of law, have to be proved. Otherwise the notification would amount to nothing more than conditions of sale prescribed by a person who is selling property by public auction.

The more serious question is whether, assuming in favour of the Government that the notification has the force of law by reason of section 69 of the Act, it is not a piece of legislation by a Provincial Legislature which is repugnant to the Indian Contract Act, in so far as it provides that the bid shall not be retracted by the offeror but is to be treated as continuing even after the second sale is commenced. Under section 5 of the Contract Act, an offer in the nature of a bid at a public auction can be revoked any time before acceptance ; and it has been held in *Champalal* v. *Ghanshamdas*[1] that any condition denying this right of revocation is illegal. A continuing offer does not mean an offer which must be kept open till acceptance ; it means it can be accepted at any time, provided it is not revoked. The trouble is not surmounted merely by pointing to the fact that as abkari falls within List No. II (items 31 and 40) (Provincial Legislative List) contracts are included in List No. III (Concurrent Legislative List) effect must be given to the notification. The question of repugnancy is different from the question of competency and is to be judged by the provisions of section 107 of the Government of India Act, as indicated by the Federal Court in *Megh Raj* v. *Allah Rakhia*[2].

It will thus be seen that the points raised are sufficiently important to be considered by a Bench of two Judges ; and the papers in this second appeal will be placed before the Chief Justice for necessary orders.

This second appeal accordingly coming on for hearing before the Bench (the Hon'ble the Chief Justice and Lakshmana Rao, J.), the Judgment of the Court was delivered by

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1. (1922) 43 M.L.J. 132 : I.L.R. 45 Mad. 799. 95 : (1942) 2 M.L.J. 797 (F.C.).
2. I.L.R. (1942) Lah. 623 : 1942 F.L.J.

The Chief Justice.—This appeal raises a question of considerable importance with regard to the conditions prescribed by the Board of Revenue for the conduct of auctions of liquor shop licences.

On the 4th February, 1942, the Sub-Collector of Tindivanam put up for sale by public auction the licences to be issued in respect of certain arrack shops. The conditions of sale were in accordance with the conditions approved by the Board of Revenue for such sales. The auction was held by the Sub-Collector, but he had no power to accept a bid. He could signify provisional acceptance, but actual acceptance rested with the Collector himself. Clause IX (*a*) of the conditions provided that the order of the Collector confirming a bid provisionally accepted by the selling officer should be final, unless revised by the Board of Revenue for special reasons. Clause IX (*b*) was to the effect that if the Collector considered the bid to be inadequate he might postpone passing orders confirming or refusing to confirm the provisional acceptance and might direct that the sale should be continued from the point at which it was left. Clause IX (*c*) stated that a sale ordered to be continued under clause IX (*b*) should begin with the bid provisionally accepted by the selling officer at the original sale and in the name of the individual who offered it. If at the subsequent sale a higher bid should be made and provisionally accepted by the selling officer the bid previously provisionally accepted should lapse, but if no higher bid should be accepted the matter should be reported by the selling officer to the Collector, who might pass orders confirming the bid provisionally accepted at the original sale or might again direct that the sale be continued from the point at which it was left at the original sale. Clause IX (*e*) stipulated that no bid which had been provisionally accepted by the selling officer should be withdrawn before it lapsed under clause IX (*c*) or before orders were passed confirming or refusing to confirm it, and provided that if the bidder committed a breach of this condition he should be liable to make good any loss suffered by the Government.

The appellant was the highest bidder for four shops and his bids were provisionally accepted by the Sub-Collector, but the Collector accepted only two of them. He refused to confirm the bids made by the appellant for the other two licences which were in respect of shops numbered 30 and 32 respectively. Here he directed that the sales should be "continued" under clause IX (*b*) of the conditions of sale. On the 17th February, 1942, the Tahsildar wrote to the appellant informing him that his bids for shops Nos. 30 and 32 had not been accepted and that the Collector had ordered that the auction sale should be continued from the bids already made by him at noon on the 20th February, 1942, at the Taluk Office, Villupuram. On the day fixed for the further auction, the appellant presented a petition to the Tahsildar in which he stated that he did not require shops Nos. 30 and 32 and asked that the amount of his deposit should be returned to him. The petition was rejected forthwith. On the 22nd February, 1942, the appellant wrote through his pleader pointing out that his bids had not been accepted by the Government, and contending that therefore he was entitled to withdraw them. On the 26th February, 1942, the Collector passed an order drawing the attention of the appellant's pleader to clauses IX (*c*) and IX (*e*) of the conditions of sale. By an order dated 27th March, 1942, the Collector accepted the bids made by the appellant on the 4th February, 1942, in respect of shops Nos. 30 and 32, but the appellant refused to take out the licences and consequently the Collector was compelled to direct a fresh sale to be held. This resulted in a loss to the Government of Rs. 1,148.

On the 15th February, 194?, the appellant filed in the Court of the District Munsiff of Villupuram the suit which has given rise to the appeal. He asked for a decree against the Provincial Government for Rs. 105 (the amount of his deposit) and for an injunction restraining the Provincial Government from taking action to recover from him the Rs. 1,148. The District Munsiff dismissed the suit on the ground that the conditions of sale had the force of law, their publication amounting to a notification under section 69 of the Madras Abkari Act, 1886. His finding

was accepted by the District Judge of South Arcot on appeal. The appellant then appealed to this Court. The appeal came before Chandrasekhara Aiyar, J., on the 29th October, 1946. The learned Judge referred it to a Bench for decision as he considered that it raised three questions, namely: (1) Whether the case fell within clause IX (*b*) of the conditions of sale; (2) whether the publication of the conditions of sale constituted a notification under section 69 of the Act; and (3) if so, whether the notification was *ultra vires* the Provincial Government because the conditions of sale conflicted with the provisions of the Indian Contract Act, a statute passed by the Central Legislature.

The learned Advocate-General has very properly conceded that the publication of the conditions of sale did not amount to a notification under section 69 of the Madras Abkari Act. The conditions of sale had been settled by the Board of Revenue, but not under any particular provision of the Act. They were merely rules drawn up by the Board for the conduct of sales of liquor shop licences and had no statutory force. This being the position the District Munsiff and the District Judge erred in holding that the conditions of sale had the force of law and the questions formulated by Chandrasekhara Aiyar, J., do not call for decision. The question which the Court has to decide is whether a bid made at such an auction and provisionally accepted can be enforced, notwithstanding that the maker withdraws it before acceptance by the Collector. In deciding the question the Court can only have regard to the law of contract.

It was held by a Division Bench of this Court (Coutts-Trotter and Ramesam, JJ.) in *Champalal* v. *Ghansham Das*[1] that a bid at a Court auction sale is merely an offer which can be withdrawn at any time before it is accepted and the lot knocked down to the bidder. The present case does not fall within the four corners of the judgment in that case because the conditions of sale were different. There was no prohibition against the withdrawal of a bid pending its acceptance. Two of the cases considered by Coutts-Trotter and Ramesam, JJ., are, however, of importance here. They are *Payne* v. *Cave*[2] and *Cooke* v. *Oxley*[3]. In the former case it was said:

> "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus poenitentiae*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed."

Cooke v. *Oxley*[3] is even more in point. There a tobacco merchant offered to sell a quantity of tobacco to the plaintiff at a certain price. The plaintiff asked the tobacco merchant for time in which to decide whether he should buy the goods or not. The time for consideration was granted; but before it expired the tobacco merchant sold the goods to a third party. The plaintiff claimed to be entitled to damages. It was held that the action did not lie. Lord Kenyon said that nothing could be clearer than that at the time of entering into the contract the engagement was all on one side. The other party was not bound and therefore it was a *nudum pactum*. In other words no consideration had passed to bind the seller by his promise to give time and consequently he was entitled to ignore it.

To have an enforceable contract there must be an offer and unconditional acceptance. A person who makes an offer has the right of withdrawing it before acceptance, in the absence of a condition to the contrary supported by consideration. Does the fact that there has been a provisional acceptance make any difference? We can see no reason why it should. A provisional acceptance cannot in itself make a binding contract. There must be a definite acceptance or the fulfilment of the condition on which a provisional acceptance is based. Our attention has been drawn to an observation made by Muttuswami Aiyar, J., in *Agra Bank* v. *Hamlin*[4], where it was also held that it was competent for a bidder at a Court

1. (1922) 43 M.L.J. 132 : I.L.R. 45 Mad. 799.
2. (1789) 3 Term Rep. 148 : 100 E.R. 502.
3. (1790) 3 Term Rep. 653 : 100 E.R. 785.
4. (1890) I.L.R. 14 Mad. 235.

auction to withdraw his bid. In the course of his judgment, Muttuswami Ayyar, J., said :

"It appears that, in the case under reference it was not one of the conditions of sale that bidders were not at liberty to withdraw their bids."

We do not regard this statement as a definite acceptance of the proposition that where there is such a condition a bid cannot be withdrawn. If Muttuswami Ayyar, J., intended so to hold, we can only express our dissent.

The learne Advocate-General has suggested that the decision of this Court in *Chitibobu Adenna* v. *Garimalla Jaggaray du*[1] recognises that there can be in law a conditional acceptance which will constitute a contract. We have already indicated that where there is a conditional acceptance and the condition is subsequently fulfille : there is a contract and that was all that was said in that case. Certain occupancy rights in jeroyiti lands had been put for sale by public auction by the amin of the Maharaja of Vizianagaram. The amin accepted a bid subject to the approval of the special agent. The special agent gave his approval whereupon the sale became irrevocable.

In the present case there was a provisional acceptance by the Sub-Collector of the appellant's bids, but the Collector refused to confirm the acceptance and directed the sale to continue. He changed his mind at a later stage and accepted the bids, but before this happened, the appellant had withdrawn them, which he was entitled to do in law as there was no consideration to support his implied acceptance of the condition that once a bid had been made it could not be withdrawn. If the conditions of sale had statutory force, the position would of course be different but they had not statutory force. They were merely conditions which the Board of Revenue had directed should be imposed in respect of auctions of liquor shop licences. We are firmly of the opinion that the appellant was entitled to withdraw his bids because the prohibition against withdrawal had not the force of law and there was no consideration to bind him down to the condition.

For these reasons, we allow the appeal and decree the suit with costs throughout.

V.S. *Appeal allowed.*

[THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Lahore.)*

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR MUHAMMAD ZAFRULLA KHAN AND H. J. KANIA, JJ.

Mussammat Parkash Kaur .. *Appellant*†

v.

Mussammat Udham Kaur *alias* Amar Kaur and others .. *Respondents.*

Government of India Act (1935), *Schedule VII, List II, Entry* 21—'*Agricultural land*'—*If includes right in or over agricultural land—Nature of the rights of a mortgagee in possession in the Punjab—Succession to such rights—If governed by the Hindu Women's Rights to Property Act*, 1937.

The expression "agricultural land" is not defined in the Constitution Act, but the language employed in Entry 21 of List II of the Seventh Schedule leaves no room for doubt that agricultural land must be deemed to include rights in or over agricultural land. Any other construction would give rise to serious anomalies.

The interest of a mortgagee in possession of agricultural land in the Punjab which is only a right to receive the rents and profits of the property till the mortgage money was repaid (the mortgagor having no right to institute a suit to recover the amount of the loan or to enforce the mortgage by bringing the mortgaged property to sale) is a right in or over agricultural land comprised within Entry 21 of List II and succession to the rights of such a mortgagee is not regulated by the Hindu Women's Rights to Property Act, 1937.

B. Banerji, Advocate, Federal Court, instructed by *Naunit Lal*, Agent, for Appellant.

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1. (1913) 28 M.L.J. 617.

* (1945) F.L.J. 234.
† Civil Appeal No. VII of 1945. 11th December, 1946.

Sardar Raghbir Singh, Senior Advocate, Federal Court (*Sardar Deva Singh Randhawa*, Advocate, Federal Court, with him) instructed by *S. K. Achariar*, Agent, for 1st Respondent.

The Judgment of the Court was delivered by

Zafrullah Khan, J.—One Harnam Singh, who was in possession of a certain area of agricultural land in the Punjab, as a mortgagee, died leaving him surviving a widow and a pre-deceased son's widow. After his death the mortgage was redeemed, the entire amount of the mortgage money being paid to the widow. The pre-deceased son's widow thereafter instituted a suit to recover one half share of the mortgage money from the widow or in the alternative from the legal representatives of the mortgagor, basing her claim on section 3 of the Hindu Women's Rights to Property Act, 1937. On a reference to this Court in Re *The Hindu Women's Rights to Property Act*[1], the Court delivered the opinion that the Act did not operate to regulate succession to agricultural land in the Governors' Provinces. The question that arose for decision in this case was whether the mortgagee rights held by Harnam Singh were or were not agricultural land. A Division Bench of the Lahore High Court, before whom the case eventually came on Letters Patent Appeal, answered the question in the affirmative and dismissed the suit but gave a certificate under section 205 (1) of the Constitution Act. The plaintiff has now come up on appeal before us.

Entry 7 of List III of the Seventh Schedule to the Constitution Act (Concurrent Legislative List) comprises wills, intestacy and succession, save as regards agricultural land. The devolution of agricultural land is thus a purely Provincial subject by virtue of Entry 21 of List II (Provincial List) which runs as follows :

"Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents, transfer, alienation and devolution of agricultural land;......"

The expression "agricultural land" is not defined in the Constitution Act but in our judgment the language employed in this Entry leaves no room for doubt that agricultural land must be deemed to include rights in or over agricultural land. Any other construction would give rise to serious anomalies.

Faced with this difficulty counsel for the appellant was forced to contend that the agricultural land covered by the mortgage was held by Harnam Singh only as security for the mortgage money, the advance of which by him to the mortgagor constituted a debt distinct and severable from the security. It was argued that the plaintiff was only seeking to recover her share of the debt due to Harnam Singh the whole of which had been repaid to the widow and which was property (other than agricultural land) left by Harnam Singh within the meaning of section 3 of the Hindu Women's Rights to Property Act and that she was not concerned with the security for the debt. This contention is based upon a misconception of the nature of the kind of mortgage held by Harnam Singh. He had, no doubt, advanced a sum of money to the mortgagor but all that he had obtained in return was possession of a certain area of agricultural land and the right to maintain that possession, to receive the rents and profits arising from the land and to exercise over and in respect of it all the other rights of user that the mortgagor was entitled to exercise till such time as the amount of the mortgage money was repaid to him. In the judgments of the Courts below the transaction is described as a usufructuary mortgage. It is not contended, however, that its nature is otherwise than as described above. Under the law regulating such mortgages in the Punjab, Harnam Singh had no right to institute a suit to recover the amount of the loan or to enforce the mortgage by bringing the mortgaged property to sale.

Our attention was drawn to *Imperial Bank of India* v. *Bengal National Bank, Ltd.* (in liquidation)[2], where their Lordships of the Privy Council held that a debt secured upon immoveable property may be transferred apart from the security. The kind

1. (1941) 2 M.L.J. 12 : (1941) F.C.R. 12 : 4 F.L.J. (F.C.) 1.
2. (1931) 61 M.L.J. 589 : L.R. 58 I.A. 323 (P.C.).

of debt and security that their Lordships were called upon to deal with in that case were very different from the kind of mortgage that is the subject-matter of controversy before us. That was a case of an ordinary loan secured upon immoveable property where the creditor would have been entitled, in the words of their Lordships, "to take a judgment for the debt without having recourse to his security." In the present case Harnam Singh had no right to recover the amount of the mortgage money by suit at all. His interest at the time of his death was only that of a mortgagee in possession entitled to receive the rents and profits of the property till the mortgage money was repaid and was in our judgment a right in or over agricultural land comprised within Entry 21 of List II.

We agree with the learned Judges of the High Court in holding that the property in dispute is agricultural land within the meaning of Entry 21 of List II and that succession to it is not regulated by the Hindu Women's Rights to Property Act. The suit was rightly dismissed by the High Court.

The appeal is dismissed with costs.

Appeal dismissed.

G. R.
V. S.

[THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Fort William in Bengal at Calcutta.)

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, MR. JUSTICE ZAFRULLAH KHAN AND MR. JUSTICE KANIA.

H. H. B. Gill (in Crl. Appeal No. II) and Anil Lahiri (in Crl. Appeal No. III.) .. *Appellants**

v.

The King-Emperor .. *Respondent.*

Government of India Act (1935), *section* 270 (1) *and Criminal Procedure Code* (*V of* 1898), *sections* 197 *and* 238—*Consent under section* 270 (1) *of the Government of India Act and sanction under section* 197 *of the Criminal Procedure Code for the prosecution of an army officer—Prosecution ending in acquittal—Retrial ordered in appeal on amended charges—Fresh consent under section* 270 (1) *of the Constitution Act and fresh sanction under section* 197, *Criminal Procedure Code—Necessity—Conviction under sections* 120-B *and* 165, *Penal Code, when the charge is under section* 120-B *read with section* 161—*Legality—Procedure, if justified by section* 238, *Criminal Procedure Code.*

A complaint against *G* an army officer and *L* a contractor of a criminal conspiracy to cheat the Government of India was filed and it was accompanied by the consent of the Governor-General acting in his discretion under section 270 (1) of the Constitution Act to the institution of criminal proceedings against *G* for offences under section 161 and section 120-B read with section 420 of the Penal Code. The sanction of the Governor-General in Council under section 197, Criminal Procedure Code to prosecute *G* for the same offence was also exhibited. The consent of the Chief Presidency Magistrate under section 196-A (2) of the Criminal Procedure Code to the initiation of the proceedings was also filed. Charges were framed against *G* and *L* under section 120-B read with section 420 of the Penal Code and a charge against *G* under section 161 in respect of one payment and a charge against *L* under section 109 read with section 161 of the Penal Code in respect of the same payment. But at the conclusion of the trial both the accused were acquitted on all the charges On appeal the High Court set aside the order of acquittal and remanded the case to the Chief Presidency Magistrate for retrial "on an amended charge of conspiracy to give and receive bribes and also on the charges under sections 161 and 161/109 of the Penal Code as previously framed." In due course the Chief Presidency Magistrate charged *G* and *L* under section 120-B read with section 161 and also framed separate charges against *G* and *L* under sections 161 and 161/109 of the Penal Code respectively with reference to a particular payment. *G* was convicted of an offence under section 165 and *L* of one under sections 165/109 of the Penal Code in respect of one payment and *G* and *L* of the offence of criminal conspiracy under section 120-B read with section 165 of the Penal Code. But the High Court on appeal upheld only the convictions under section 120-B read with section 165 of the Penal Code.

On the objections that *G's* trial was bad for the reason that the consent of Governor-General under section 270 (1) of the Constitution Act to the institution of proceedings against him under section 120-B read with section 161 had not been given, that it was vitiated by want of sanction under section 197, Criminal Procedure Code and that the Magistrate was not legally competent to

* Crl. Appeals No. II and III of 1946. 11th December 1946.

record a conviction under sections 120-B/165 when the charge was in respect of an offence under section 120-B read with section 161,

Held, (1) the consent of the Governor-General to the institution of criminal proceedings against *G* "for having committed the offences punishable under section 161 and section 120-B read with section 420 of the Indian Penal Code" was a sufficient compliance with the requirements of section 270 (1) of the Constitution Act for the purpose of this case and no further or fresh consent was necessitated by the order of the High Court whereby the case was remanded for retrial on fresh charges. It made no difference that the Magistrate framed a fresh charge in pursuance of the direction of the High Court. The institution of the proceedings having been consented to by the Governor-General under section 270 (1) of the Constitution Act, the subsequent course of proceedings would be governed by the relevant provisions of the Code of Criminal Procedure. Further, no consent under section 270 (1) was required inasmuch as an agreement by a public servant to receive illegal gratification and the receipt of such gratification by him cannot be said to be acts done or purporting to be done in the execution of duty. (2) The sanction of the Governor-General under section 197, Criminal Procedure Code given originally enabled the Chief Presidency Magistrate to take cognizance of the offence set out in the sanction and cognizance having properly been taken, the subsequent course of the proceedings would be regulated by the relevant provisions of the Code of Criminal Procedure. The mere fact that at the stage of framing charges against the accused the Magistrate thought fit to frame charges under section 161 and section 120-B read with section 161 instead of under section 161 and 120-B read with section 420 would not render the sanction already given nugatory and invalidate the Magistrate's action in taking cognizance of the offences set out in the sanction. (3) There was nothing illegal in a conviction under sections 120-B/165, Penal Code when the charge was in respect of an offence under section 120-B read with section 161 and further, was justified by the provisions of section 238 of the Criminal Procedure Code.

N. Barwell, Senior Advocate, Federal Court (*Tarachand Mathur*, Advocate, Federal Court, with him) instructed by *Ganpat Rai*, Agent, in Crl. Appeal No. II and *B. Banerji*, Advocate, Federal Court, instructed by *Ganpat Rai* Agent, in Crl. Appeal No. III, for Appellants.

A. K. Basu, Senior Advocate, Federal Court (*N. K. Sen*, Advocate, Federal Court, with him), instructed by *P. K. Bose*, Agent, in Crl. Appeals Nos. II and III for Respondent.

The Judgment of the Court was delivered by

Zafrullah Khan, J.—This case has had a chequered history.

The facts, so far as they are material at this stage, are these. The appellant Gill is an Army Officer and was between March 1941 and July 1942, Deputy Assistant Director of Contracts and Deputy Controller of Purchase at Calcutta, and in that capacity was responsible for the issue and acceptance of tenders for purchase of materials on behalf of certain Departments of Government. The appellant Lahiri was a contractor for the supply of such materials.

On 25th February, 1943, a complaint was filed by a Deputy Superintendent of Police in the Court of the Chief Presidency Magistrate, Calcutta, alleging that between March 1941 and July 1942, Gill and Lahiri were parties to a criminal conspiracy to cheat the Government of India by dishonestly or fraudulently inducing its officers to pay larger sums of money than would otherwise have become due to Lahiri in respect of contracts for the supply of materials placed with Lahiri's firm by Gill on behalf of Government and that in pursuance of this conspiracy Lahiri had on various occasions made payments to Gill. The complaint was accompanied by the consent of the Governor-General acting in his discretion, under section 270 (1) of the Constitution Act to the institution of criminal proceedings against Gill for offences punishable under section 161 and section 120-B read with section 420 of the Penal Code. There was also exhibited the sanction of the Governor-General in Council under section 197 of the Code of Criminal Procedure to the prosecution of Gill for the same offences. The consent of the Chief Presidency Magistrate under section 196-A (2) of the Code of Criminal Procedure to the initiation of the proceedings was also filed.

On 4th May, 1943, the Chief Presidency Magistrate framed a charge against Gill and Lahiri under section 120-B read with section 420 of the Penal Code and a charge against Gill under section 161 of the Penal Code in respect of one particular

payment of Rs. 500 and a charge against Lahiri under section 109 read with section 161 of the Penal Code in respect of the same amount of Rs. 500.

The object of the criminal conspiracy which was the subject-matter of the first charge was " to cheat the Government of India in the Department of Supply by dishonestly or fraudulently inducing its Financial Officers to pay larger sums of money than due (in respect of specified contracts) by means of false representation regarding . . . . . . the rates quoted (by Lahiri's firm) and character and capacity of supply made by them in preference to those of other firms."

On the conclusion of the trial the learned Magistrate found that a conspiracy to cheat Government was not established. With reference to the charges under sections 161 and 161/109 he found that though the payment of the amount set out in the charge was admitted by Gill, there was something to be said for the explanation that he had offered as to the consideration for which the payment had been made to him. On these findings he acquitted both accused on all the charges.

Against the acquittals the Crown carried an appeal to the High Court at Calcutta which was decided on the 8th December, 1944. The learned Judges of the High Court agreed with the learned Magistrate that the evidence led in support of the conspiracy charge did not establish that charge but held that the proper charge should have been one of conspiracy to give and receive bribes. They, therefore, set aside the order of acquittal and remanded the case to the Chief Presidency Magistrate for trial " on an amended charge of conspiracy to give and receive bribes and also on the charges under sections 161 and 161/109 of the Indian Penal Code as previously framed."

The case then went back to the Chief Presidency Magistrate who on 22nd June, 1945, charged Gill and Lahiri under section 120-B read with section 161 of the Penal Code with being parties to a criminal conspiracy between March 1941 and July 1942 with the object of Lahiri giving and Gill accepting gratifications other than legal remuneration in the matter of Lahiri's contracts as specified, and also framed separate charges against Gill and Lahiri under sections 161 and 161/109 of the Penal Code respectively with respect to the payment of Rs. 500. The trial proceeded on these charges. In the end the learned Magistrate found that all the payments alleged to have been made by Lahiri to Gill were proved. He disbelieved Gill's explanation with regard to the payment of Rs. 500. He did not think, however, that the evidence warranted the definite conclusion " that there was anything improper done in the sense that Government incurred any loss or that Lahiri obtained any contract which he ought not to have obtained " He felt that in that view he would not be justified in convicting the acccused under sections 161 and 120-B/161 and considered it " safer " to convict Gill of an offence under section 165 and Lahiri of one under sections 165/109 of the Penal Code (presumably in respect of the payment of Rs. 500 though this is left in some doubt in his judgment) and both Gill and Lahiri of the offence of criminal conspiracy under section 120-B read with section 165 of the Code. He sentenced each of them to simple imprisonment for three months and a fine of Rs. 210 under sections 165 and 165/109 and passed no separate sentence under sections 120-B/165. His order is dated 13th August, 1945.

On appeal to the Calcutta High Court the learned Judges gave the appellants the benefit of doubt with regard to the consideration for the payment of Rs. 500 and set aside the convictions under sections 165 and 165/109. They also gave them the benefit of doubt with regard to one particular item out of the remaining payments, but held that the rest of the payments were established and that they were without consideration. They consequently upheld the convictions under section 120-B read with section 165 and maintained the sentence of imprisonment passed upon each of the appellants but remitted the fines. Their judgment was pronounced on 12th April, 1946.

Before the High Court objection was taken on behalf of Gill that his trial was bad for the reason that the consent of the Governor-General under section 270 (1) of the Constitution Act to the institution of proceedings against him under section 120-B read with section 161 had not been given. The High Court repelled the contention holding that the matter was concluded by the judgment of this Court in *Huntley's Case*[1].

Section 205 (1) of the Constitution Act enjoins upon every High Court the duty to consider in every case whether or not any substantial question of law as to the interpretation of the Constitution Act or any Order in Council made thereunder is involved and of its own motion to give or to withhold a certificate accordingly. The judgment of the High Court in this case is silent as to any such question being involved. It was stated before us that Gill's legal advisers construed the absence of any such reference in the judgment of the High Court as a withholding of the certificate. If the learned Judges of the High Court were of the opinion that the constitutional question argued before them was clearly covered by a judgment of this Court they might well have taken the view that the question was no longer a substantial one within the meaning of section 205 (1) and that consequently no certificate should be given. Gill, was, therefore, advised to move His Majesty in Council for special leave to appeal against the order of the High Court. This motion was made on 18th July, but the Judicial Committee declined to entertain the motion on the ground that the High Court should have been asked to consider the question whether a substantial question of law as to the interpretation of the Constitution Act was or was not involved in the case. As a consequence, an application was made to the High Court on 12th August, for the grant of a certificate under section 205. On 22nd August the learned Judges of the High Court made the following order :—

"A certificate under section 205 (1) of the Government of India Act, 1935, is applied for and granted."

An application for a copy of this order was made on 26th August, and the copy was supplied on 4th September.

Armed with the certificate Gill and Lahiri lodged their appeals in this Court; the former on 1st October, and the latter on 7th October (October 2nd to 6th being Court holidays).

On the face of them the appeals when lodged were barred by time under the relevant rules of this Court and the appellants, therefore, filed an application praying that the period of limitation may be extended under section 5 of the Limitation Act. At the hearing Counsel for the Crown intimated that he did not desire to press the question of limitation. Having regard to the course of events set out above we were satisfied that the appellants had sufficient cause for not preferring their appeals within the prescribed time. We accordingly admitted the appeals.

The only constitutional question raised before us was that Gill's trial on the charge framed against him under sections 120-B/161 on 22nd June, 1945, was bad for want of the consent of the Governor-General under section 270 (1) of the Constitution Act. We are unable to accede to this contention. In our judgment the consent of the Governor-General, dated 28th January, 1943, to the institution of criminal proceedings against Gill "for having committed during the years 1941 and 1942 offences punishable under section 161 and section 120-B read with section 420 of the Indian Penal Code" was a sufficient compliance with the requirements of section 270 (1) of the Constitution Act for the purposes of this case and no further or fresh consent was necessitated by the order of the High Court of 8th December, 1944, whereby the case was remanded for retrial on fresh charges. It makes no difference that the Magistrate framed a fresh charge in pursuance of the direction of the High Court. The institution of the proceedings having been consented to by the Governor-General under section 270 (1) of the Constitution

1. (1944) 1 M.L.J. 503 : (1944) F.C.R. 262 : 1944 F.L.J. 167.

Act, the subsequent course of the proceedings would be governed by the relevant provisions of the Code of Criminal Procedure. The objection in respect of the amended charge is also effectively met by the reason relied upon by the High Court for overruling it, namely, that no consent under section 270 (1) is required for the institution of proceedings in respect of an offence under section 120-B read with section 161 inasmuch as an agreement by a public servant to receive illegal gratification and the receipt of such gratification by him cannot be said to be acts done or purporting to be done in the execution of duty. [See *Huntley's Case*[1]].

Two other questions were argued before us with our leave. It was urged that Gill's trial was vitiated by want of sanction under section 197 of the Code of Criminal Procedure in respect of an offence under sections 120-B/161 of the Penal Code. Here too, the contention was that inasmuch as the sanction of the Governor-General under that section was confined to the prosecution of Gill "for having committed during the years 1941 and 1942 offences punishable under section 161 and section 120-B read with section 420 of the Indian Penal Code" it was not adequate to cover a charge under section 120-B read with section 161.

Section 197 lays down that .

"When any public servant . . . . is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of" the prescribed authority.

It was urged on behalf of the Crown that no sanction under this section was required as the offence charged against Gill under sections 120-B /161 was not committed by him while acting or purporting to act in the discharge of his official duty. We consider it unnecessary to enter upon a discussion and determination of that question as in our judgment the sanction of the Governor-General in Council dated 3rd February, 1943, enabled the learned Chief Presidency Magistrate to take cognizance of the offences set out in the sanction and cognizance having properly been taken, the subsequent course of the proceedings would be regulated by the relevant provisions of the Code of Criminal Procedure. The mere fact that at the stage of framing charges against the accused the Magistrate came to the conclusion that on the basis of the evidence recorded, charges ought to be framed under section 161 and section 120-B read with section 161 instead of under section 161 and section 120-B read with section 420, would not render the sanction already granted nugatory and invalidate the Magistrate's action in taking cognisance of the offences set out in the sanction. It is again immaterial that fresh charges were framed in pursuance of the direction of the High Court. We consider therefore that the trial of Gill on the charge under sections 120-B/161 was not rendered illegal for want of sanction under section 197 of the Code of Criminal Procedure.

Next it was argued that the learned Magistrate was not legally competent to record a conviction under sections 120-B/165 when the charge was in respect of an offence under section 120-B read with section 161. We do not think this contention has any force. The charge under sections 120-B/161 was one of conspiracy to give and receive illegal gratifications with the motive that favour shall be shown to the person giving the illegal gratifications in respect of business in which he was concerned and which was about to be transacted by the person receiving the illegal gratifications in his capacity as a public servant. To establish this charge it was necessary to prove (1) that Lahiri and Gill had entered into an agreement in pursuance of which payments were to be made and were in fact made by Lahiri to Gill, (2) that these payments were without lawful consideration, (3) that Gill received the payments knowing that Lahiri was concerned in business which Gill was transacting or was about to transact in his capacity as a public servant, and (4) that the motive for the payments was that Gill should show favour to Lahiri in transacting the business. If the first three elements were proved but the motive was not proved, an offence under sections 120-B/ 161 would not be brought home

1. (1944) 1 M.L.J. 503 : (1944) F.C.R. 262 1944 F.L.J. 167.

to the accused, but they would nevertheless be guilty of an offence under sections 120-B/165. The evidence did not satisfy the learned Magistrate that favour was actually shown. This did not mean that the illegal gratification was not given and received with the motive that favour should be shown; but the learned Magistrate thought that it would not be safe on his finding to convict the appellants of an offence under sections 120-B/161. As, however, it was proved to his satisfaction that in pursuance of an agreement entered into between them payments were to be made and had been made by Lahiri to Gill and that Gill had received the amounts without lawful consideration knowing that Lahiri was concerned in business which Gill was transacting or was about to transact in his capacity as a public servant he proceeded to convict them of offences under sections 120-B/165. In our judgment he was justified by the provisions of section 238 of the Code of Criminal Procedure in adopting this course.

No other question was raised before us.

The appeals are dismissed. The appellants will now surrender to their bails and serve out their sentences.

Appeals dismissed.

G. R.
V. S.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KUPPUSWAMI AYYAR.

Sadasivan (minor) represented by his maternal uncle and guardian
P.A.R. Chandrasekhara Nadar and others .. *Appellants**

v.

L. Palaniappa Chettiar and another .. *Respondents.*

Provincial Insolvency Act (V of 1920), section 39—Annulment on the sanctioning of a composition—Secured creditor not a party to the arrangement—No steps taken to realise his security before annulment—His rights, how affected by the composition approved by the Court.

On a question as to the rights of a secured creditor of an insolvent when the adjudication has been annulled as the result of the Court having sanctioned a composition, the creditor not being a party to the arrangement and having taken no steps to realise his security before the annulment.

Held, before the amendment in 1935, section 39 of the Provincial Insolvency Act made the composition scheme binding on all creditors entered in the schedule so far as it related to a debt entered therein. Now it expressly binds all the creditors so far as debts provable under the Act are concerned. Until an order of discharge is passed a secured creditor can at any time come in and prove the balance owing to him after the realisation of his security. In the case of annulment the position is very different from the position which arises when the insolvent has obtained an unconditional order of discharge.

Therefore, where there has been no order discharging the insolvent, but merely an annulment of the order of adjudication, a secured creditor is bound by a composition of which the Court has approved in so far as the balance of his debt is concerned after the realisation of his security. The fact that he has taken no part in the composition proceedings makes no difference. He can realise his security at any time, but when he does and there is a deficiency he can only get payment on the basis of the composition, because the unsatisfied portion of the debt is "provable" in the Insolvency Court in the absence of an unconditional order of discharge.

Appeal under Clause 15 of the Letters Patent from the judgment of the Hon'ble Mr. Justice Rajamannar, dated 20th December, 1945, and passed in S. A. No. 148 of 1945, preferred to the High Court against the decree of the District Court of Ramnad at Madura in A. S. No. 325 of 1943, preferred against the decree of the Court of the Subordinate Judge of Sivaganga in O. S. No. 24 of 1942.

S. Desikachari, N. T. Raghunathan and *N. T. Ramanujam* for Appellants.

A. V. Visvanatha Sastri for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—In this appeal the Court is called upon to decide what are the rights of a secured creditor of an insolvent when the adjudication has been

* L. P. A. No. 14 of 1946. 6th December, 1946.

annulled as the result of the Court having sanctioned a composition, the creditor not being a party to the arrangement and having taken no steps to realize his security before the annulment.

On the 19th October, 1937, the first defendant in the suit out of which the appeal arises executed a promissory note in favour of the plaintiff for Rs. 3,000. The first defendant at that time was joint with his four sons (defendants 2 to 5), all of whom are minors. As security for the advance the first defendant executed in favour of the plaintiff what has been described as a continuing security bond. The properties covered by the bond formed part of the family estate. On the 17th December, 1937, two creditors applied to the Subordinate Court of Madura for the adjudication of the first defendant under the provisions of the Provincial Insolvency Act. On the 21st February, 1938, an order of adjudication was passed, and in accordance with the provisions of section 27, the first defendant was directed to apply for his discharge within one year. Within the year the first defendant submitted to the Insolvency Court a proposal for a composition in satisfaction of his debts. He offered to pay ten annas in the rupee. The wife of the first defendant, as the guardian of her minor sons, consented to the arrangement. The consent was necessary because the proposal involved the transfer of properties belonging to the joint family to trustees for the purpose of realisation. There were three secured creditors. The plaintiff refused to accept the proposal, but the other two secured creditors did so. Apparently, their securities did not represent as much as ten annas in the rupee. By an order dated the 10th July, 1939, the Court sanctioned the scheme and on the 8th October, 1939, the trust deed was executed by the father and by the minors acting through their mother. In due course the trustees realised all the assets of the family, except those charged to the plaintiff and two other lots of immoveable property. The proceeds of the realisation were sufficient to pay all the consenting creditors ten annas in the rupee. The administration was closed on the 30th November, 1940, when the unsold properties were delivered back to the minors' guardian. The properties charged to the plaintiff remained, of course, subject to his charge.

On the 16th March, 1942, the plaintiff filed the present action in the Court of the Subordinate Judge of Sivaganga for a decree directing the realisation of the properties charged to him, and, in the event of the proceeds proving to be insufficient to pay him in full, directing the balance to be realised from the other properties of the defendants and from the first defendant personally. The Subordinate Judge held that as the first defendant had only a one-fifth interest in the properties charged, the plaintiff must, in the first place, look to the proceeds of sale of that interest. If the money realized was not sufficient to discharge the liability in full the plaintiff was entitled to have recourse to all the joint family properties in the hands of the defendants. The sons appealed to the District Judge of Ramnad who agreed with the Subordinate Judge that the first defendant was only entitled to a one-fifth share of the properties charged to the plaintiff, but he held that if the one-fifth share did not satisfy the claim, the plaintiff could have recourse to the sons' interest in the sale proceeds. Should there still be a deficiency, the plaintiff was entitled to proceed against the joint family properties in the hands of the sons, but only to the extent of ten annas in the rupee with interest at six per cent per annum. The plaintiff appealed to this Court. His appeal was heard by Rajamannar, J., who restored the decree of the Subordinate Court. The learned Judge considered that the case fell within the judgment of the Court delivered in *Chockalinga* v. *Manicka*[1] but in view of the decision in *Govindas Chathurbhujadas* v. *Ramadas*[2] he gave the first defendant's sons leave to appeal under clause 15 of the Letters Patent. They availed themselves of the leave and their appeal is now before us.

In *Chockalinga* v. *Manicka*[1] a mortgagee filed a suit on his mortgage and obtained a final decree for sale. Subsequently the mortgagor was adjudicated insolvent

1. (1942) 1 M.L.J. 11 : I.L.R. 1942 Mad. 448. 521.
2. (1924) 48 M.L.J. 252 : I.L.R. 48 Mad.

under the Provincial Insolvency Act, but he obtained his discharge unconditionally. The discharge was the governing factor in the case. During the pendency of the insolvency proceedings the mortgagee took no steps to enforce his mortgage decree, but he did so after the discharge of the insolvent and in execution proceedings he obtained an order for sale of the hypotheca. The amount realised was not sufficient to pay off the mortgage debt and consequently the mortgagee applied for a personal decree for the balance. It was contended by the mortgagor that in view of his unconditional discharge a personal decree could not be passed against him. According to him section 44 (2) of the Provincial Insolvency Act stood in the way. The Court refused to accept the contention for these reasons. Section 47 in effect says that the debt of a secured creditor is not provable until he has realised his security or has abandoned it or valued it. Until one of these events has happened there is no debt "provable" in the insolvency proceedings. A secured creditor may prove, but his right is a contingent one and until the contingency arises he is outside the Act. When a secured creditor has not during the insolvency proceedings realised his security or surrendered or valued it, section 44 (2) does not affect him, because no portion of the debt due to him has become provable and the section only applies to debts which are provable in the insolvency. This means that a secured creditor is entitled to a personal decree if his security has not been realised before the discharge of the insolvent. If it has been realised during the pendency of the insolvency proceedings and there is a deficiency, the balance of the debt constitutes a debt provable in the insolvency and in such a case section 44 (2) will operate to cancel it.

The difference between an *unconditional discharge of* an insolvent and an *annulment* of insolvency is of importance. When an insolvent has obtained an order of discharge he is by virtue of section 44 released from payment of provable debts, except (*a*) a debt due to the Crown; (*b*) a debt or liability incurred by means of fraud or fraudulent breach of trust to which he was a party; (*c*) a debt or liability in respect of which he has obtained forbearance by fraud to which he was a party; or (*d*) a liability under an order for maintenance made under section 488 of the Code of Criminal Procedure, 1898. An order of annulment in itself does not release an insolvent from the payment of his debts. Section 37 states that when an adjudication is annulled, all sales and dispositions of property and payments duly made and all acts theretofore done, by the Court or receiver, shall be valid; but, subject to this, the property of the debtor who has been adjudged insolvent shall vest in such person as the Court may appoint, or, in default of an appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing declare. A vesting order is intended to be for the benefit of the creditors and allows the Court to retain supervision of the administration of the assets vested. Section 39 provides that if the Court approves the proposal for a composition or a scheme of arrangement, the order of adjudication shall be annulled, the provisions of section 37 shall apply, and the composition or scheme shall be binding on all the creditors so far as it relates to a debt provable under the Act. Section 40 states that if default is made in the payment of an instalment due in pursuance of the composition or scheme, or if it appears that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, it may readjudge the debtor insolvent and annul the composition or scheme, but without prejudice to the validity of any transfer or payment duly made or of any thing duly done under or in pursuance of the composition or scheme. Therefore in the case of annulment the position is very different from the position which arises when the insolvent has obtained an unconditional order of discharge.

The facts in *Govindas Chathurbhujadas* v. *Ramadas*,[1] have very little in common with the facts in *Chockalinga* v. *Manicka*[2]. In *Govindas Chathurbhujadas* v. *Ramadas*[1]

1. (1924) 48 M.L.J. 252 : I.L.R. 48 Mad. 521.
2. (1942) 1 M.L.J. 11 : I.L.R. 1942 Mad. 448.

the respondent was adjudicated insolvent under the Presidency Towns Insolvency Act. A statutory majority of his creditors agreed to accept a composition of eight annas in the rupee. No regular scheme of composition was placed before the Court, but the insolvent filed an affidavit to the effect that his creditors had agreed to the composition. The Court accepted the statements in the affidavit and annulled the adjudication. The appellant, a secured creditor, had not realised his security or proved for the balance before the order of annulment was made. No notice had in fact been given to him of the application for annulment. Subsequently, he instituted a suit for a decree directing the sale of the securities through the Court and the payment by the insolvent personally of the balance should the sale proceeds prove to be insufficient. It was held that the annulment of an adjudication under section 30 of the Act did not amount to a discharge or release of the insolvent in respect of debts provable in insolvency, that the secured creditor's claim for the balance after realisation of the security was a debt provable in insolvency, that notwithstanding that the secured creditor was not a party to the composition, he was bound by it in respect of the unsecured balance of his debt and that he was not restricted to an application in insolvency by way of remedy but could file a suit on the basis of the composition. The relevant provisions of the Presidency Towns Insolvency Act do not differ materially from the corresponding provisions of the Provincial Insolvency Act.

The judgment in *Govindas Chathurbhujadas* v. *Ramadas*[1] has direct bearing here. When the facts in the two cases are fully understood it is manifest that there is no conflict between *Chockalinga* v. *Manicka*[2] and *Govindas Chathurbhujadas* v. *Ramadas*[1] and we see no reason to doubt the correctness of either decision. The fundamental difference between the two is that in the former case the insolvent received an unconditional discharge before the secured creditor took action while in the latter case there was no discharge, but merely an annulment of the adjudication as the result of the acceptance of a composition. Section 33 (3) says that a creditor whose debt is provable under the Act may, at any time before the insolvent's discharge, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule. Consequently until an order of discharge is passed a secured creditor can at any time come in and prove the balance owing to him after the realisation of his security.

Section 126 of the Bankruptcy Act of 1869 provided that a composition which had been accepted by a resolution of the creditors should be binding on all those included in the statement of the debtor produced at the meetings at which the resolution was passed, but should not affect or prejudice the rights of other creditors. Referring to this section, James, L.J., in In re *Bestwick*: Ex parte *Bestwick*[3] said :

"Section 126 indeed says that the composition is to be accepted in satisfaction of the debts ; it says nothing about the debts of those creditors who may hold security, and the words, if taken literally, would compel a secured creditor to accept the composition in satisfaction of the whole amount of his debt, but they have been always construed as meaning that he is to take the composition only on the ultimate balance of his debt which may remain due after realising his security. When he has realised his security he has a right to say to the debtor so much remains due to me, pay me the composition upon that."

As pointed out in *Govindas Chathurbhujadas* v. *Ramadas*[1], section 126 of the Bankruptcy Act of 1869 was not reproduced in the Bankruptcy Act of 1883, but similar provision was made. Section 18 (8) of the Act of 1883 provided that an accepted composition should be binding on all the creditors so far as it related to debts due to them from the debtor and provable in bankruptcy.

The principle laid down in In re *Bestwick*: Ex parte *Bestwick*[3] has been accepted in India. The provisions of section 39 of the Provincial Insolvency Act, as amended by the Provincial Insolvency (Amendment) Act, 1935, follow the provisions of section 18 (8) of the English Act of 1883. Before the amendment, section 39 of

1. (1924) 48 M.L.J. 252 : I.L.R. 48 Mad. 521.
2. (1942) 1 M.L.J. 111 : I.L.R. (1942) Mad. 448.
3. (1876) 2 Ch. D. 485 at 487.

the Provincial Insolvency Act made the scheme binding on all creditors entered in the schedule so far as it related to a debt entered therein. Now it expressly binds all the creditors so far as debts provable under the Act are concerned. Therefore where there has been no order discharging the insolvent, but merely an annulment of the order of adjudication a secured creditor is bound by a composition of which the Court has approved in so far as the balance of his debt is concerned after the realisation of his security. The fact that he has taken no part in the composition proceedings makes no difference. He can realise his security at any time, but when he does and there is a deficiency he can only get payment on the basis of the composition, because the unsatisfied portion of the debt is "provable" in the Insolvency Court in the absence of an unconditional order of discharge.

For these reasons the appeal must be allowed and the decree of the District Judge restored with costs throughout.

V. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

M. Ramanathan Chettiar and others .. *Petitioners.**

Madras District Municipalities Act (V of 1920), section 347—Notification extending certain provisions to a Panchayat Board area—Failure to include section 347 in the notification—Prosecutions for offences punishable under the District Municipalities Act—Maintainability.

The Local Government at the request of a Panchayat Board extended certain provisions of the Madras District Municipalities Act to the area under the control of that Panchayat Board. But in the notification order issued under section 206 of the Madras Local Boards Act the provisions of section 347 of the Madras District Municipalities Act was not included, with the result that the provision as regards the person who is to prosecute for offences under the provisions of the Madras District Municipalities Act was not included and there was no machinery for starting such prosecutions. In prosecutions for certain offences under the Municipalities Act, within the Local Board area,

Held, such prosecutions cannot be maintained until the provisions of section 347 are applied to the Local Board area with the necessary amendments as regards the persons who are to start the prosecutions. It will be open to the Local Government to take the necessary steps to remedy the defect in future.

Petitions under sections 435 and 439, Criminal Procedure Code, praying that the High Court will be pleased to revise the judgment of the Court of the Stationary Sub-Magistrate, Dharmapuri, dated 13th November, 1945, in C. C. No. 1851 of 1945, etc.

C. S. Swaminathan for Petitioners.

P. Govinda Menon for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—These three revision petitions arise out of prosecutions under the District Municipalities Act. The area in which these offences are said to have been committed is no doubt not a portion of the Municipal area but a portion of the Local Board area. The provisions of the District Municipalities Act were extended to this area. The petitioners in these three cases have been prosecuted in C. C. No. 1851 of 1945 (Cr. R. C. No. 1097 of 1945), and C. C. No. 1852 of 1945 (Cr. R. C. No. 1098 of 1945) and C. C. No. 2113 of 1945 (Cr. R. C. No. 411 of 1946) for offences punishable under section 199 read with section 317 of the Madras District Municipalities Act in the former two cases and in the third case for offences punishable under sections 205 and 317 of the same Act. These offences relate to default with regard to the obtaining of sanction for erecting buildings. When the Local Government at the request of the Panchayat Board of Dharmapuri extended the provisions of the District Municipalities Act to the area under the control of the

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* Cr. R. Cs. Nos. 1097 and 1098 of 1945 & 411 of 1946. 19th December, 1946.
(Cr. R. Ps. Nos. 1016 and 1017 of 1945 & 396 of 1946).

Panchayat Board, a notification order was issued under section 206 of the Madras Local Boards Act which runs thus :

"No. 623.—In exercise of the powers conferred by section 206 of the Madras Local Boards Act, 1920 (Madras Act XIV of 1920) the Government of Madras are hereby pleased at the request of the Dharmapuri Panchayat and of the Dharmapuri District Board to extend to the Dharmapuri village, the following provisions of the Madras District Municipalities Act, 1920 (Madras Act V of 1920) and the rules framed thereunder : (i) Chapter IX—Streets and Chapter X—Buildings Regulations ; (ii) so much of sections 308 (9), 313, 317 and 338, and Schedules VII and VIII as relate to Chapters IX and X aforesaid; and (iii) clauses (4), (11),(24) and (29) of section 3, clauses (8) and (10) of section 306 read with section 203-A of the Madras Local Boards Act, 1920, and section 344 of the Madras District Municipalities Act, 1920, subject to the modification that in the said provision, all references to 'Municipal Council', 'Council,' 'Municipal' and 'Municipality' shall be construed as references Panchayat, all references to 'Chairman', 'Executive authority' as references to President of the Panchayat and the reference to 'Schedule IV' in section 344 as a reference to Schedule IV of the Madras Local Boards Act, 1920."

Unfortunately the provision of section 347 of the District Municipalities Act was not included in this notification with the result that the provision as regards the person who is to prosecute any such offences is not included and that there is no machinery for starting these prosecutions. It is therefore contended that in the absence of such a provision for starting prosecutions in such cases these prosecutions must fail, since it can be started only by a person specifically mentioned. On the other side it is argued that these prosecutions must have been construed as prosecutions under the Local Boards Act. It is not a prosecution under the provisions of the Local Boards Act. It is only a case where the provisions of the District Municipalities Act are extended to the Local Board area and the prosecution is one under the District Municipalities Act and the provision providing the machinery by which the prosecution is to be started is not there. The lacuna of such a provision would not entitle the Local Board to act in the way in which it did. This is not a case in which it can be said that the prosecution under the Local Boards Act is a prosecution under the District Municipalities Act in respect of a portion of the Local Board area to which this Act is extended.

Consequently all the three petitions are allowed and it is found that the prosecution cannot be maintained until the provisions of section 347 are applied to this Local Board area with the necessary amendments as regards the persons who are to start the prosecutions. It will be open to the Local Government to take the necessary steps to remedy the defect in future.

V.S. — *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE GOVINDARAJACHARI.

The Sri Arumughanainar Koil Devasthanam, Viswanathaperi Village, Sivagiri Zamin of which the Zamindar of Sivagiri is the hereditary trustee or manager now under the management and control of the manager appointed by the Court of Wards, Madras. *Appellant**

v.

Kandasami Moopanar .. *Respondent.*

Madras Court of Wards Act (I of 1902), section 63—Scope—Ward being trustee of temple—Wrongful alienation of trust property—Avoidance by trustee—Manager of Court of Wards—Power to avoid alienation—Lease of temple property for seven years—Rent received in advance and appropriated by trustee for personal expenses—Validity.

Section 63 of the Court of Wards Act empowers the Court, when the ward is a hereditary trustee of a temple, to make such arrangements as it thinks fit for the discharge of the ward's duties as trustee, and the proviso making special provisions for the discharge of his religious duties expressly places within the Court's superintendence any duty connected with the preservation of the property. If, therefore, it was the duty of the ward as trustee of the temple to take such action as was necessary to recover the property which he himself had wrongfully leased ignoring the interest of the institution then the Court of Wards is empowered to make such arrangements as it thinks fit to see that that duty is performed. In such circumstances, the Court through its manager, on behalf of the ward

*Appeal No. 446 of 1945. 3rd December, 1946.

who is the trustee, can maintain the suit to recover the property which has been wrongly alienated, always provided that such an action could be maintained by the ward himself if he were in active control of the trust. That such an action can be maintained by a trustee even when the wrongful alienation is due to his own act is also well established in law.

Where the lease of temple property was for a period of seven years and there was an advance payment of the entire rent about two years before the lease came into effect which was utilised for the private purposes of the trustee and there was nothing to show that there was even an apparent necessity for the temple to make such an inappropriate form of lease,

Held, that the lease was clearly not beneficial to the temple and must be set aside.

Appeal against the decree of the Court of the Subordinate Judge, Tinnevelly, dated 16th March, 1945, in O. S. No. 32 of 1944.

A. Swaminatha Aiyar and *S. Thyagaraja Aiyar* for Appellant.

K. C. Subramaniam Chettiar for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellant was the plaintiff in a suit for recovery of possession of certain properties with past mesne profits. The properties in question admittedly belong to a Devastanam of which the Zamindar of Sivagiri is the trustee. On 21st November, 1940, the Court of Wards, by an order under section 18 of the Court of Wards Act, took over the superintendence of the Sivagiri estate, and on 28th January, 1941, a notification was issued to the effect that the superintendence of the trust properties had been taken over by the Court of Wards and the management entrusted to its manager. The properties now in suit were in 1933 held under a lease which was to terminate in two years' time. On 14th January, 1938, the respondent submitted a petition (Ex. P-1) to the Zamindar in which he prayed for the grant of a lease in respect of the suit lands, described as "Arumugha Nayinar-koil Manibam lands" for seven years, from fasli 1350 to fasli 1356 at a rental of Rs. 580 per annum, the petitioner offering to pay the rent in advance. On the same date an order was issued (Ex. D-8) to the effect that the Zamindar had sanctioned the lease and had received the advance rent of Rs. 4,060 and directed the execution of a muchilika in accordance with the conditions of sale. As a matter of fact no auction of the lease appears to have been held though there is some reference to an auction in Ex. D-8. The muchilika was accordingly executed on 18th January, 1938. When the Court of Wards took over the estate an enquiry was held into this lease and it was brought to the notice of the Court that though the rent might be deemed to be reasonable having regard to the fact that it was paid in advance two years before the lease began to run, the lease was in excess of the powers of the trustee with reference to section 76 (1) of the Madras Hindu Religious Endowments Act. It was also ascertained that the advance rent collected by the Zamindar had been appropriated by him and not credited to the Devastanam. The Court of Wards was at first inclined not to incur the expense of the litigation which would result from the cancellation of the lease and it requested the Hindu Religious Endowments Board to sanction the lease. This the Board quite properly declined to do. Thereupon the Court directed its manager to give notice of the determination of the lease and to take steps to recover possession of the property. Hence the present suit.

All the issues of fact have been found in favour of the plaintiff and it has been found that the lease in question is an unlawful lease not justified by any benefit to the temple and in excess of the powers of the trustee. The learned Subordinate Judge has however dismissed the suit on the view that section 63 of the Court of Wards Act does not empower the Court of Wards to institute proceedings for the recovery of properties belonging to the Devastanam of which the ward is the trustee and which have been wrongfully alienated by the ward. Section 63 runs as follows:

"If a ward is the hereditary trustee or manager of a temple, mosque or other religious establishment, or endowment, the Court, notwithstanding, anything contained in section 22 of the Religious Endowments Act, 1863, may make such arrangements as it thinks fit for the discharge, during the wardship of the ward's duties as trustee or manager, provided that for the direct and personal management of the religious affairs of any such institution, establishment or endowment the Court shall appoint suitable persons other than officers of Government and that the Court shall as far as possible restrict its superintendence to the preservation of the property belonging to the institution, establishment or endowment."

Prima facie this section empowers the Court when the ward is a hereditary trustee of a temple to make such arrangements as it thinks fit for the discharge of the ward's duties as trustee, and the proviso making special provisions for the discharge of his religious duties expressly places within the Court's superintendence any duty connected with the preservation of the property. If, therefore, it was the duty of the ward as trustee of the temple to take such action as was necessary to recover the property which he himself had wrongly leased ignoring the interest of the institution, then, by this section, the Court of Wards is empowered to make such arrangements as it thinks fit to see that that duty is performed. Surely, in such circumstance the Court can through its manager, on behalf of the ward who is the trustee, maintain the suit to recover the property which has been wrongly alienated, always provided that such an action could be maintained by the ward himself if he were in active control of the trust. That such an action can be maintained by a trustee even when the wrongful alienation is due to his own act seems to be established. Mr. Ganapathi Iyer in his "Hindu and Mahomedan Endowments" (2nd edition) at page 532 summarises the power of the trustee or manager as follows :

> "If he alienates either by way of mortgage or sale for satisfaction of his debts or for no necessary purpose of the institution, he may himself in his capacity as manager, sue to set aside the mortgage and he will not be estopped from doing so."

The learned author quotes a large number of cases as authority for this position. This pronouncement has been approved by the Bench consisting of Wallace and Thiruvenkatachariar, JJ., in *Sivaswami Aiyar* v. *Thirumudi Chettiar*[1] in which the following passage occurs :

> "The decisions have gone to this extent, *viz.*, that in the case of public trusts, religious or charitable, even the trustee who alienates can bring a suit for the recovery of the property and he is not personally estopped from doing so."

Other decisions to the same effect which have been quoted before us are *Yasim Sahib* v. *Ekambara Aiyar*[2], and *Syed Ghulam Nabi Sahib* v. *Nagammal*[3]. We have also been referred to a passage in *Juggut Mohini Dossee* v. *Mst. Sokheemoney Dossee*[4]. It seems to us to follow that if this suit had been brought by the zamindar of Sivagiri himself at the time when the estate was not under the superintendence of the Court of Wards he could, notwithstanding his own personal liability for the breach of trust in creating this lease, have sued on behalf of the temple to recover the property. It is therefore difficult to see how the Court of Wards which is charged with the duty of making arrangements for the discharge, during the wardship, of the ward's duties as trustee, cannot through its manager maintain such a suit.

The learned Subordinate Judge has taken the view that because the Court of Wards acting under section 63 of the Court of Wards Act cannot exercise all the extraordinary powers given to it in the earlier sections of the Act with reference to the non-trust properties of the estate, it has no power to recover the properties of the trust estate which have been wrongly alienated. It seems to us that this conclusion is based on a failure to appreciate the full effect of section 63. We do not think it necessary to go into the question which has been discussed at length by the learned Subordinate Judge regarding the powers of a *de facto* trustee to sue to recover wrongly alienated properties of the trust. In our view there is no question of a *de facto* trustee here. The trustee is the zamindar who is a *de jure* trustee, whose powers are by statute exercised by the Court of Wards through its manager.

An attempt has been made by Mr. Subramaniam Chettiar for the respondent, to justify this alienation on the ground that the rent paid was adequate and the property is one which necessarily has to be leased. By the terms of section 76 (1) of the Madras Hindu Religious Endowments Act the lease for a term exceeding five years of immoveable property belonging to a temple is not to be valid or operative unless it is necessary or beneficial to the temple and is sanctioned by

1. (1928) 57 M.L.J. 219 at 227.
2. (1919) 37 M.L.J. 698.
3. (1896) 6 M.L.J. 270.
4. (1871) 14 M.I.A. 289 at [illegible]

the Board or the Committee as the case may be. Quite apart from the fact that this lease was for seven years, it had the most undesirable feature of an advance payment of rent made two years before the lease was to begin, the whole of the rent being appropriated to the private purposes of the trustee and no attempt has been made to show that there was even an apparent necessity for the temple to make such an inappropriate form of lease. It seems to us that the lease was clearly not beneficial to the temple and that it must be set aside.

Turning to the question of mesne profits, the trial Court has found that the proper rate of profits for the years in respect of which the past mesne profits are claimed is Rs. 2,205 per annum and has left future mesne profits to be determined in execution. We find that the claim for mesne profits is restricted in the plaint to a sum of Rs. 11-4-7, *i.e.*, profits for two days. This amount must be decreed and the rate of future mesne profits will have to be determined in execution. It is, however, apparent to us that the respondent should not be required to pay mesne profits without being given credit for the amount of rent which he has already paid for those particular years. From the documents filed in the case by the Court of Wards it is clear that the Court of Wards is treating the amount of this rent appropriated by the zamindar as a loan repayable without interest by the estate to the Devastanam. The Devastanam will, therefore, in due course if it has not done so already collect from the zamindar's estate the sum of Rs. 580 per annum. The future mesne profits recoverable from the respondent for the years for which the lease still had to run will be determined in execution and will be payable by the respondent less the sum of Rs. 580 per annum. The appeal is therefore allowed and the suit will be decreed accordingly with costs here and in the Court below.

B.V.V. —————— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

Kamakshi Ammal .. *Appellant**

v.

Ananthanarayana Swami Pillai and others .. *Respondents.*

Limitation Act (IX of 1908), schedule I, Article 181—Starting point of limitation under—Mortgage suit—Preliminary decree passed—Assertion of title paramount by third party—Resistance by mortgagee—Adverse decision by trial Court—Appeal—Application under Order 34, rule 6, Civil Procedure Code—Starting point.

The *terminus a quo* under Article 181 of the Limitation Act has to be determined having regard to the nature of the particular case and the right to relief claimed therein. The Court has jurisdiction to pass a combined decree awarding relief first against the mortgaged property and then against the mortgagor personally for the deficit, if any, instead of passing two decrees successively at the different stages. But it cannot be said that rule 6 of Order 34, Civil Procedure Code, applies where the mortgagee is deprived of his title by the assertion of a title paramount which is upheld by the Court. In such a case the mortgagee's right to apply for a personal decree accrues the moment when it was finally decided by the Court that the mortgagor had no title to the property. In the case of a mortgagee who has obtained a preliminary decree and who subsequently defends the mortgagor's title to the mortgaged properties against attacks by third parties in a suit, it is open to him, when he fails in the Court in the first instance to carry the matter in appeal. And the starting point of limitation for his application for a personal decree under Order 34, rule 6, Civil Procedure Code will be the date when the appeal was finally disposed of.

Appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, dated 25th April, 1945, in A. S. No. 197 of 1944 (A. S. No. 275 of 1943, District Court, Trichinopoly) preferred against the order of the Court of the District Munsiff, Turaiyur, in E. A. No. 832 of 1942, in O. S. No. 5 of 1933.

M. S. Vaidyanatha Ayyar for Appellant.

T. V. Muthukrishna Aiyar and *S. Ramachandra Aiyar* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This appeal was heard by Chandrasekhara Aiyar, J., in the first instance and was referred by the learned Judge to a Division Bench as

* A. A. O. No. 478 of 1945. 29th November, 1946.

an important question of law was raised and the point is not covered by any direct authority.

One Pal Kangani, the predecessor in interest of respondents 1 to 3 in this appeal obtained a preliminary decree for sale on a deed of simple mortgage executed by one Natesa Goundan, the appellant's deceased husband on the 11th October, 1924. The decree was passed on the 14th February, 1933, by the District Munsiff of Turaiyur in O. S. No. 5 of 1933. The final decree followed on the 9th January, 1934. During the pendency of that suit Natesa Goundan's sister, Mookayi, brought a suit against the appellant as the widow and representative of Natesa Goundan for a declaration of her title to certain properties including the properties mortgaged by Natesa and for other consequential relief. The mortgagee was impleaded as the second defendant in that suit and one of the issues was "whether the mortgage in favour of the second defendant by Natesa Goundan is binding on the plaintiff" (issue 5). The trial Court passed a decree declaring that the suit properties belonged to the second plaintiff (Mookayi's legal representative) and declaring also that "the mortgage deed executed by Natesa Goundan in favour of the second defendant in respect of items 1 and 2 of the plaint Schedule and the mortgage decree obtained by the 2nd defendant on his mortgage are not binding on him." From this decree which imperilled his security the mortgagee preferred, after an unsuccessful appeal to the first appellate Court, a second appeal to this Court which was also dismissed on the 6th August, 1941. The mortgage decree obtained by him having thus been declared to be invalid and inoperative, he made the application which has given rise to this appeal on the 25th August of the same year praying that a personal decree for the amount declared due under the preliminary decree with subsequent interest be passed against the assets of the deceased mortgagor in the hands of the appellant. In the affidavit filed in support of the application he referred to the proceedings in Mookayi's suit culminating in the dismissal of his second appeal to this Court, and stated that "as after the said decision the plaintiff and the defendants (mortgagor's representatives) have lost their rights in the mortgaged properties it is not possible to bring to sale in execution the properties relating to the decree in this suit." The application was opposed by the appellant herein on the ground that it was barred by limitation under Article 181 of the Limitation Act which prescribes for applications for which no period of limitation is provided elsewhere in the Act a period of three years commencing from the time "when the right to apply accrues." The appellant contended that the respondent's right to apply for a personal decree accrued as soon as the trial Court decided in Mookayi's suit that the mortgagor had no title to the mortgaged properties, that is, on the 20th July, 1936, and the present application made more than three years after that date was barred. The District Munsiff accepted this contention and dismissed the application. On appeal by the present respondents the lower appellate Court held that the mortgagee's right to apply for a personal decree accrued only when it was finally decided that the mortgagor had no title to the property which he had mortgaged, that is to say, when this Court dismissed the mortgagee's second appeal on the 6th August, 1941, and that the present application filed a few days thereafter was well within time. Chandrasekhara Aiyar, J., in his referring order thought that this was a "sensible view," but doubted whether it was legally correct, having regard to the "analogous decisions" cited before him. We have come to the conclusion for reasons which we will presently indicate, that the view is not only sensible but also correct.

Mr. M. S. Vaidyanatha Aiyar urged on behalf of the appellant that the reasoning of the Subordinate Judge was erroneous and unsound and the conclusion based thereon was unsustainable. The learned Judge said :

"If instead of straightaway filing a petition under Order 34, rule 6, after the decision of the High Court in S. A. No. 1024 of 1938, the decree-holder had gone through the formality of a sale of these properties which he would be legitimately entitled to do—for the mortgagor judgment-debtor would not be entitled to prevent a sale of the properties in execution of the decree—the mortgagee decree-holder would be entitled to file an application for the passing of a personal decree within three years from the date of that sale in execution of the said properties. In these circumstances I do not think that it could be said that the appellant gave up his rights under the decree until the final adjudi-

cation of the mortgagor's title to the hypothecated property which took place only on the High Court dismissing the second appeal."

This reasoning is no doubt open to criticism. In the face of the decision in Mookayi's suit to which the mortgagee was a party it would not be possible for him to bring the property to sale in execution of the mortgage decree, for that would be asking the Court to be a party to a mockery and fraud. As pointed out in *Periyasami Kone* v. *Muthiah Chettiar*[1], "it is an elementary principle of law that the Court will not do a vain thing, nor will it compel a man to do a fruitless thing." Nor could there be any question of the mortgagee "giving up his rights" after it was finally decided that the mortgagor had no title to the property mortgaged. It does not, however, follow that the conclusion of the learned judge is unsustainable.

It must now be taken as fairly settled that Article 181 of the Limitation Act is applicable to applications for a supplemental personal decree in mortgage actions. (*Rama Venkatasubba Aiyar* v. *Shanmukham Pillai*[2], *Pell* v. *Gregory*[3], *Muhammad Iltifat Husain* v. *Alimunnissa Bibi*[4].) This was not disputed before us by Mr. S. Ramachandra Aiyar for the respondents. Now, Article 181 is the residuary article applicable to applications of all kinds and as such is content to define the starting point of limitation in general language "when the right to apply accrues." It is, accordingly, necessary in each case where the article is invoked, to see when, having regard to the nature of the application, the applicant, first had the right to make it. It was contended for the appellant that the respondent's application was one made under Order 34, rule 6, although there was or could be no sale of the mortgaged property under rule 5, a sale being deemed to have taken place and to have realised nothing and that, inasmuch as the right to apply under that rule for a personal decree arises when the sale proceeds "are found insufficient to pay the amount due," limitation must be counted from the earliest moment when the mortgagor's want of title was established, *i.e.*, the 20th July, 1936.

In support of the first step in that argument, which takes us pretty far into the land of fiction reference was made to *Sivasubramaniam Pillai* v. *Poovalingam Pillai*[5], *Gurumukh Singh* v *Harichand*[6] and *Adhar Chandra Naskar* v. *Sarnwamoyi Dasi*[7]. In the first mentioned case a sale held in execution of a mortgage decree was declared to be void in collateral proceedings as the property was found to be trust property which the mortgagor had no right to mortgage, and the mortgagee applied for a personal decree more than three years after the date of the decree declaring the sale to be void but within three years of his dispossession. Phillips, J., held that the application was barred by limitation. The learned Judge regarded it as one falling under Order 34, rule 6 and observed that:

"as soon as the decree declaring the sale to be void was passed it must be deemed to have been found that the sale of the property was insufficient to pay the mortgage debt."

In *Gurumukh Singh* v. *Harichand*[6], there was not even a sale in execution of the mortgage decree as the property had been previously sold in execution of the decree of a prior mortgagee. But the fiction was extended and the case brought within rule 6, the learned Judges observing that "even if no sale was held under Order 34, rule 5, in circumstances similar to those existing in the present case, an application under Order 34, rule 6 could be maintained." The case in *Adhar Chandra Naskar* v. *Sarnwamoyi Dasi*[7] arose on similar facts and it was held that the Court had jurisdiction to pass a personal decree under rule 6. The learned judges regarded the matter as having been settled by the decision of the Judicial Committee in *Jeuna Bahu* v. *Parmeshwar Narayan Mahtha*[8]. It is to be observed that except in *Sivasubramania Pillai* v. *Poovalingam Pillai*[5] no question of limitation arose, and the only point in controversy was whether, in the circumstances of those cases, the mortgagee was entitled to a personal decree at all, it being assumed that, if he was, it must be by virtue of Order 34, rule 6. It seems to us that it would be doing violence to the

1. (1913) I.L.R. 38 Mad. 677.
2. (1913) M.W.N. 867.
3. (1925) I.L.R. 52 Cal. 828 (F.B.).
4. (1918) I.L.R. 40 All. 551.
5. (1926) 24 L.W. 280.
6. (1935) I.L.R. 17 Lah. 67.
7. (1928) 32 C.W.N. 1160.
8. (1918) 36 M.L.J. 215: I.L.R. 47 Cal. 370 (P.C.).

language of rule 6 to hold that it applies to cases where the mortgagor is found, in an adjudication binding on the mortgagee, to have had no right to mortgage the property. The decision in *Jamna Bahu* v. *Parmeshwar Narayan Mahtha*[1] lends, in our opinion, no countenance to the view taken in cases referred to above. Their Lordships were dealing with a combined decree passed under sections 89 and 90 of the Transfer of Property Act (corresponding to Order 34, rules 5 and 6 respectively) ordering the realisation of the amount due by the sale of the mortgaged property and, in case of any deficit, from the mortgagor personally, observing that it was not a condition precedent to the power of decreeing the payment of the balance that the mortgaged property must first be sold and found insufficient to satisfy the debt. In other words, the Court has jurisdiction to pass a combined decree awarding relief first against the mortgaged property and then against the mortgagor personally for the deficit, if any, instead of passing two decrees successively at the different stages contemplated. This, in our view, is no authority for holding that rule 6 applies to a case where the mortgagee is deprived of his security by the assertion of a title paramount.

This, however, is not to say that the mortgagee is not entitled at all, in such circumstances, to a personal decree for the amount due to him. His right to have a personal decree is provided for in section 68 of the Transfer of Property Act. The limitations and qualifications of that right are to be found in sub-section (2) of that section as well as in Order 34, rules 6 and 14. According to these provisions, the right cannot be effectively enforced until the mortgagee has realised the security in full, in appropriate proceedings. But this impediment to the exercise of his right disappears when he is deprived of his security in consequence of the mortgagor's wrongful act in purporting to charge property to which he had no title. And where, as in the present case, he has already instituted a suit to enforce the mortgage and obtained a decree for sale which has been however declared void and inoperative in proceedings to which both the mortgagor and the mortgagee were parties, the relationship of decree-holder and judgment-debtor disappears and the parties are relegated to the position of plaintiff and defendant. A somewhat similar position arose in *Bisheshwar Nath* v. *Chandulal*[2], where the Court held that Order 34, rule 6 did not apply but that the mortgagee was entitled, *apart from that rule*, to a personal decree in the suit which he had already brought, when the mortgage was declared invalid for want of title in the mortgagor at the instance of third parties in collateral proceedings.

If what we have indicated above was the true position when the respondent's final decree was declared to be inoperative in Mookayi's suit, it would seem arguable, and it was so argued by Mr. Ramachandra Iyer before us, that no question of limitation could arise as no "application" by the mortgagee was necessary for the passing of a personal decree, and the application made by the respondents was no more than a reminder to the Court of its duty to terminate the pending suit by passing a personal decree after making such further enquiry as might be necessary. Cf. *Ramanathan Chetti* v. *Alagappa Chetti*[3] and *Ramasubramania Pattar* v. *Karimbil Pati*[4]. But, as we have already observed, it has been held that an application is necessary to commence the proceeding for passing a personal decree and that Article 181 is applicable to it. This was laid by this Court even before the words "on application by him" were introduced into rule 6 by the Transfer of Property (Amendment) Supplementary Act, 1929 (*Rama Venkatasubba Aiyar* v. *Shanmukham Pillai*[5]). In *Bisheshwar Nath* v. *Chandu Lal*[2] too, Article 181 was applied, although the application for a personal decree in that case was held not to fall under rule 6. We prefer, therefore, to deal with the question on the assumption that Article 181 applies.

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1. (1918) 36 M.L.J. 215 : I.L.R. 47 Cal. 370 (P.C.).
2. (1927) I.L.R. 50 All. 321.
3. (1929) 59 M.L.J. 102 : I.L.R. 53 Mad. 378.
4. (1940) 1 M.L.J. 54 : I.L.R. 1940 Mad. 372 (F.B.).
5. (1913) M.W.N. 867.

As we have already observed, the *terminus a quo* under that article has to be determined having regard to the nature of the particular case and the right to relief claimed therein. In this connection it must be borne in mind that it is obviously a matter of great importance to the mortgagee to safeguad his security by defending the mortgagor's title to the property against attacks by third parties, as a successful defence might conceivably make all the difference between realisation of his debt and total loss of his money. That, we apprehend, is why an implied covenant is annexed to every contract of mortgage that the mortgagor will defend his title (section 65 (6) of the Transfer of Property Act) and the mortgagee is given the right to spend such money as is necessary for supporting the mortgagor's title to the property and to add such money to the principal where the mortgagor fails to take proper steps to support his title [section 72 (c)]. It is therefore perfectly legitimate for the mortgagee to take all such steps to support the mortgagor's title as are open to him under the law, and if his defence of such title fails in the Court of first instance, to carry the matter to the appellate Courts, where appeals are allowed. Why, then, should the mortgagee be required to commence proceedings for a personal decree as soon as the issue is first decided against him, on pain, if he does not, of losing the remedy by the bar of limitation setting in, where the law allows a right of appeal and he desires to avail himself of it? To make the time start from the first adverse decision would lead to the anomaly that, while he is permitted to spend money in supporting the mortgagor's title even in the Court of appeal and add it to the principal money, the money so spent might become irrecoverable, by reason of the mortgage money to which it is to be added getting barred before the proceedings in the appellate Court are concluded.

It was said that the mortgagee's right to apply for a personal decree must be taken to have accrued at the moment when he could *first* have made the application and that on the 20th July, 1936, when it was first decided that the mortgagor had no title to the property. It is true that under Article 181 time must be computed from the date when the right to apply *first* accrued, and it is also true as a general proposition that when once time has begun to run the uncertainty caused by an appeal or other proceeding cannot suspend its course. But the question remains when did the mortgagee's right first accrue on the facts of this case? Obviously, it accrued only when he was deprived of his security. Can it be said that he was deprived of it as soon as the first Court declared Mookayi's title to the mortgaged property? Evidently, he did not think so himself, or he would not have appealed. When deprivation of a mortgagee's security turns on the varying fortunes of a law suit, his own view of the matter cannot altogether be ruled out of consideration. If he thought that an appeal was worthwhile and preferred one which he must have done on legal advice, why should he be supposed to have been deprived of his security as soon as the first Court gave its adverse decision? Until the second appeal was dismissed by this Court the mortgagor's title was *sub judice* and the mortgagee cannot, in such circumstances, be reasonably considered to have been deprived of his security. It was, of course, open to him to accept the decree of the first Court and apply for a personal decree forthwith. In that case the date of the deprivation would be the date of that decision. But he was not bound to do so as the law allows him to take all proper steps to support the mortgagor's title, and, so long he was *bona fide* taking such steps, he cannot, in our judgment, be held to have suffered deprivation of his security.

We do not feel much oppressed by the authority of *Juscurn Boid* v. *Pirthichand Lal Choudhury*[1] which was strongly pressed upon us by Mr. Vaidyanatha Aiyar. That was a suit by a purchaser at a rent sale for recovery of sums paid to the zamindar after the sale was set aside. Treating the suit as one for money paid upon an existing consideration which afterwards failed, governed by Article 97 of the Limitation Act, the Judicial Committee held that the "date of the failure" from which limitation

1. (1918) 36 M.L.J. 557 : L.R. 46 I.A. 52 : I.L.R. 46 Cal. 670 (P.C.).

starts under that Article was the date of the first Court's order setting aside the sale and not the date when that order was affirmed by the appellate Court.

Their Lordships observed :

> "Both Courts have held that the failure of consideration was at the date of the first Court's decree. Their Lordships feel no doubt that as between these two decrees this is the correct view, for whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal."

The consideration being the rent sale, its failure occurred when the sale was "reversed" by the decree of the first Court, and as the operation of that decree was not suspended during the pendency of the appeal it could not be said that there was any fresh failure of consideration at the date of the appellate decree. We do not think that the principle of that decision has any application here.

We were referred by way of analogy to numerous other decisions holding that the decree of the appellate Court did or did not furnish, as the case may be, the starting point for limitation. We think that no useful purpose will be served by canvassing these decisions at any length. As we have already observed, Article 181 is an "omnibus" one and the general language of column 3 has to be applied having regard to the nature of the right which forms the basis of the application in particular case. The decisions cited on either side serve only to illustrate the variety of cases coming within the purview of the article and are not of much assistance to the party citing them. For instance, *Ramaswami M dali* v. *Velayudha Mudali*[1] referred to by Mr. Vaidyanatha Aiyar, lays down no general principle. The case arose under the Limitation Act of 1859 which provided that in cases founded on fraud the cause of action shall be deemed to have arisen when the fraud was first discovered, and it was held that a purchaser suing for his purchase money when it was found that his vendor had already sold the property to another must have first discovered the fraud as soon as the prior purchaser's suit was decreed by the Court of first instance and not when that decree was affirmed by the appellate Court. The observation that "the appeal from the decree was a voluntary proceeding taken at the plaintiffs' own risk" must be understood with reference to the facts of that case, and not as laying down a general rule that, wherever limitation has to be reckoned from the date of a judgment of Court, the date of the judgment of the Court of first instance and not the date of its affirmation by the appellate Court should be the *terminus a quo*. On the other hand, it has been held by the Privy Council in *Chandramani Shaha* v. *Anarjan Bibi*[2] that the three years' period prescribed under Article 180 for an application for delivery of possession by a purchaser at an execution sale starts not from the date of the order of the first Court confirming the sale but from the date when that order is affirmed by the appellate Court, as that is to be regarded as the time "when the sale becomes absolute." Applying that principle this Court held in *Rajambal* v. *Thangam*[3] (which furnishes the nearest analogy to the present case) that the right to apply for a personal decree accrues to the decree-holder under Article 181 only on the date of the dismissal of the judgment-debtor's appeal against the order refusing to set aside the execution sale, dissenting from the observations in *Krishnabandhu Ghatak* v. *Panchkari Saha*[4] with regard to the decree-holder's right to wait until such an appeal is disposed of.

On a careful consideration of the question which is by no means free from difficulty, we think that the conclusion reached by the learned Subordinate Judge is right and we accordingly dismiss the appeal with costs.

B.V.V. *Appeal dismissed*

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1. (1869) 4 M.H.C.R. 266.
2. (1934) 67 M.L.J. 79 : L.R. 61 I.A. 248 : I.L.R. 61 Cal. 945 (P.C.).
3. (1935) 42 L.W. 518.
4. (1930) I.L.R. 58 Cal. 741.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Sri Soundararaja Perumal Devasthanam, Negapatam, by its trustees, L. R. Ganapathi Thevar and others .. *Petitioners**

v.

S. R. M. Soundararaja Pillai and others .. *Respondents.*

Court-Fees Act (VII of 1870 as amended), section 7 (iv) (f)—Suit for account—Suit by temple trustees against previous trustees—Prayer for taking of account and recovery of amounts—Allegations of mismanagement and falsification of accounts—Court-fee payable.

The trustees of a temple sued the previous trustees to render a true and proper account with reference to the transactions, collections, expenses, remissions, amounts allowed to become time-barred, etc., and for the appointment of a commissioner to examine the accounts. The first charge against the trustees was in respect of the "estimated loss" on account of the deliberate and regular underselling of paddy for which the defendants were bound to account, if they failed to give a proper explanation. After giving some of the instances, the plaintiffs estimated the loss on that account at a certain figure. The other charges against the defendants was systematic and unauthorised excess expenditure and the creation of faked up receipts and vouchers for expenses alleged to have been incurred. It appeared that the defendants had not previously submitted an account of their management of the properties of the temple. On a question as to the court-fee payable,

Held, that the suit was one for an account falling within section 7 (*iv*) (*f*) of the Court-Fees Act, and that *ad valorem* court-fee was not payable on the basis that the suit was for recovery of specific sums.

Sakkammal v. *Arunachalam Pillai*, (1945) 2 M.L.J. 460, distinguished.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, East Tanjore, at Negapatam, dated 26th January, 1946, in O. S. No. 39 of 1945.

S. Tyagaraja Aiyar for Petitioners.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The Court delivered the following

JUDGMENT.—On a reading of the plaint in the case, I am clearly of opinion that the suit was properly valued under section 7, clause (*iv*) (*f*) of the Court-Fees Act and that *ad valorem* court-fee is not payable. The learned District Judge relied on a decision of Byers, J., in *Sokkammal* v. *Arunachalam Pillai*[1]. From the judgment of the learned Judge it appears that he was dealing with a suit for the recovery of specific sums. In that case accounts had already been furnished by the guardian to the District Court and in the plaint details of amounts misapplied and misappropriated were given. The prayer was for the recovery of such sums. But in the present case the prayer is to pass a decree, directing the defendants to render a true and proper account with reference to the transactionss, collections, expenses, remissions, amounts allowed to become time-barred, non-collections, etc., set forth in several paragraphs of the plaint and for the appointment of a Commissioner to examine the accounts and vouchers that have been produced already and handed over to the plaintiff Devasthanam by the first defendant. In paragraph 6 the first charge against the trustees is in respect of the "Estimated loss" on account of the deliberate and regular underselling of paddy for which the defendants are bound to account, if they fail to give a proper explanation. After giving some of the instances of such underselling the paragraph winds up in this way :—" The plaintiff estimates the loss to the Devasthanam on account of this underselling at about Rs. 2,500." The second charge is "systematic and unauthorised excess expenditure." After giving instances the plaintiffs say that "the defendants are bound to give a satisfactory explanation for the above alleged excess expenditure and in default be liable for such sums as may be unexplained." Likewise there are charges on account of unauthorised and unjustified litigation expenses in respect of amounts not collected from the lessees and cases of faked up receipts and vouchers, etc. The plaint in this case clearly differs from the plaint with which Byers, J., was

* C. R. P. No. 370 of 1946. 16th December, 1946.

1. (1945) 2 M.L.J. 460.

concerned in the decision cited above. On behalf of the Government Pleader it is pointed out that even in the present case there is an allegation that the managing trustee caused the accounts of the temple to be examined carefully in the light of audit reports. But the facts in *Sokkammal* v. *Arunachalam-Pillai*[1] were different. The accounts were submitted to the Court by the guardian after they had been audited under the orders of the Court. What is alleged in paragraph 5 of the present plaint is that the fact of mismanagement, misappropriation, acts of negligence, etc., happened to be discovered in the light of the audit reports. It is not as if the accounting party had submitted the accounts as in *Sokkammal* v. *Arunachalam Pillai*[1] and what remained was only to surcharge and falsify items. In this case the auditor examined only the accounts of the temple and the ex-trustees never submitted an account of their management and it is not in respect of such an account that the plaintiffs now seek to surcharge and falsify. On the other hand, in my opinion the present case falls within the scope of the rulings in *Payidimarri Madhava Sarma* v. *Veluri Seshagirirayadu*[2] and *Muhammad Hussain* v. *Shaik Muhammad Malumiar*[3]. The order of the lower Court is, therefore, set aside. No order as to costs.

B.V.V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Thulasi Ammal .. *Appellant**

v.

Vedavyasachariar and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 48—Period of twelve years—Starting point—Decree for possession and mesne profits—Decree to be executed where there has been an appeal, a second appeal and a Letters Patent Appeal.

A decree was passed in 1921 for possession and future mesne profits for three years from date of plaint to the date of delivery of possession or until expiry of three years from the date of decree, whichever event was earlier. The matter was carried in appeal, second appeal and again in Letters Patent Appeal. In each Court the appeal was dismissed, the date of the decree in the Letters Patent Appeal being 15th September, 1932. The decree-holder applied on 19th June, 1942, within twelve years from the date of the disposal of the Letters Patent Appeal, to execute the decree by attachment and sale and for recovery of mesne profits up to 1927, the date on which he had obtained possession. On a contention that the application was barred by section 48, Civil Procedure Code and that mesne profits could be granted only up to 1924,

Held, that the execution application was within time, as the decree to be executed was the decree passed in the Letters Patent Appeal in 1932 and that the decree-holder was entitled to mesne profits up to 1927, the date on which he obtained possession, it being earlier than the period of three years from the date of the decree in the Letters Patent Appeal.

Nacharammal v. *Veerappa Chettiar*, (1946) 1 M.L.J. 128 : I.L.R. 1946 Mad. 817, applied.

Appeal against the order of the Court of the Subordinate Judge, Dindigul, dated 2nd April, 1945, and made in A. S. No. 32 of 1944 (E. P. No. 211 of 1943, in O. S. No. 850 of 1919, District Munsiff Court, Periakulam).

C. A. Seshagiri Sastri for Appellant.

K. S. Desikan and *T. P. Gopalakrishna Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant obtained a decree on 10th November, 1921, in O. S. No. 850 of 1919 on the file of the District Munsiff of Periakulam. The matter was carried in appeal and in second appeal and then again in Letters Patent Appeal. In each Court the appeal was dismissed, the date of the decree in the Letters Patent Appeal being 15th September, 1932. The first Court decreed the suit for possession and future mesne profits for three years from the date of plaint to the date of delivery of possession or until the expiry of three years from the date of decree, whichever

1. (1945) 2 M.L.J. 460.
2. (1935) 70 M.L.J. 292.
3. A.I.R. 1936 Mad. 525.

* A. A. A. O. No. 247 of 1945. 22nd November, 1946.

event was earlier. The petitioner put in the present application on 19th June, 1942, praying for the attachment and sale of certain immoveable property, for recovery of mesne profits up to 1927, in which year the appellant obtained possession of the suit property, for the costs awarded in the Letters Patent Appeal, and for interest on mesne profits. Both the trial Court and the lower appellate Court held that the application was barred by virtue of section 48 of the Code of Civil Procedure; because the date of the present application was more than twelve years from the date of the first Court's decree. They further held that even if the claim had not been totally barred by virtue of section 48 of the Code, mesne profits could have been granted only up to 1924, as the Court had awarded mesne profits only for three years from the date of the decree. Nevertheless, both the Courts agreed that the appellant was entitled to execute for the costs of the Letters Patent Appeal.

The decisions of the Courts below are based on *Nagalinga Chetti* v. *Srinivasa Aiyangar*[1]. This case was however considered, together with a number of Privy Council decisions bearing on the same point in *Nacharammal* v. *Veerappa Chettiar*[2] and it was held that since the decree to be executed was the decree of the appellate Court, the appellant was entitled to execute his decree, since the application had been filed within twelve years of the decree in the Letters Patent Appeal. Applying that decision to the facts of this case, the application of the appellant was in time.

With regard to mesne profits, since the decree to be executed was the decree of this Court in Letters Patent Appeal, the appellant was entitled to mesne profits up to three years of the passing of the decree of this Court or up to the date on which he obtained possession, whichever was the earlier. That would mean that he was entitled to mesne profits from the date of plaint up to 1927, when delivery was given to him. It was so held in *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh*[3], a decision of the Privy Council.

The appellant does not in this Court press for interest on mesne profits.

Except on the question of interest, this appeal is allowed with costs to be paid by the first respondent in all the three Courts. The second respondent is not shown to have claimed any interest in the suit property at any stage; and it has not been shown why he should have been impleaded. The appeal as against him is dismissed with costs.

The trial Court will determine the actual amount due to the appellant.

Appeal allowed against 1st Respondent.

V.P.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

K. C. Valayudhan .. *Petitioner**

v.

P. R. Raman Nair .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 435 and 436—Power of Court of revision to direct further enquiry—Discharge by trial Court of one of the six accused charged under section 430, Indian Penal Code—Sessions Judge setting aside discharge order and directing further enquiry on the ground that fresh evidence was available—Propriety of course adopted.

The petitioner, one of the six accused charged under section 430, Indian Penal Code, was discharged by the trial Judge. The order of discharge was set aside on application to the Sessions Judge

1. (1941) 1 M.L.J. 365.
2. (1946) 1 M.L.J. 128 : I.L.R. 1946 Mad. 817.
3. (1900) 10 M.L.J. 290 : L.R. 27 I.A. 209 : I.L.R. 23 All. 152 (P.C.).

* Cr. R. C. No. 461 of 1946.
(Cr. R. P. No. 443 of 1946).

9th December, 1946.

and further enquiry was ordered. The Sessions Judge based his order on the ground that fresh evidence was available which would establish the fact of instigation on the part of the petitioner and that in view of that circumstance, the matter should be re-opened and enquired into afresh. In revision,

Held, such a course was not ordinarily to be adopted by a revision Court. As pointed out by Sankaran Nair, J., in *Lakshmi Narasappa* v. *Mekala Venkatappa*, (1907) 18 M.L.J. 57 : I.L.R. 31 Mad. 133, "a power to order what is practically a re-trial, to give a complainant another opportunity of re-examining witnesses and adducing fresh evidence ought not to be presumed, as it would be unjust to the accused and open wide the door to perjury and corruption." In the circumstances, as it was open to the complainant to file a fresh complaint against the petitioner on the same averments and to make the fullest use of the fresh evidence available, there was no sufficient or special ground to set aside the order of discharge and to direct fresh enquiry.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Session, South Malabar, dated 25th March, 1946, in Crl. R. P. No. 2 of 1946, preferred against the order of the Stationary Sub-Magistrate, Palghat, dated 28th December, 1945, in C. C. No. 145 of 1945.

V. V. Srinivasa Aiyangar and *N. Krishnamachary* for Petitioner.

L. S. Veeraraghava Aiyar for Respondent.

The Court made the following

ORDER.—The petitioner was the first accused in C. C. No. 1415 of 1945 on the file of the Stationary Sub-Magistrate, Palghat. He was along with six others charged under section 430, Indian Penal Code, for causing mischief by digging a channel in a certain plot of land and wrongfully diverting water from the respondent's wet lands. After examining the prosecution witnesses the trying Magistrate discharged accused 1 and 6 and framed charges against the remaining accused. Against the order discharging the petitioner (first accused), an application was filed in the Sessions Court, South Malabar, by the complainant. The learned Sessions Judge set aside the order of discharge so far as the petitioner is concerned and directed further enquiry. The present revision petition has been filed against that order.

The sole ground on which the further enquiry has been ordered by the learned Sessions Judge is that in a petition dated 3rd December, 1945, sent by the petitioner to the Sub-Magistrate, Alatur, the petitioner has stated that he directed the second accused to divert the water. The learned Sessions Judge pointed out that if the petition is admitted in evidence and proved it would show that the first accused abetted by instigation the commission of the offence with which the second accused was charged.

The complainant alleged in the Sessions Court that he had applied for an adjournment to summon a clerk of the Alatur Sub-Magistrate's Court to prove the petition referred to above, and that in spite of it the Magistrate discharged the first accused on the ground of want of evidence. On the filing of the revision petition a report appears to have been called for by the learned Sessions Judge from the Sub-Magistrate with reference to this averment and the Sub-Magistrate denied that any such application was made for adj urnment or that a certified copy of any such petition was tendered in evidence. Subsequent to this an affidavit was filed by the complainant respondent's advocate to which reference is made by the learned Sessions Judge ; but apparently the learned Sessions Judge did not further consider the matter in view of the specific denial by the Sub-Magistrate of the fact of any such application for adjournment having been made or petition having been offered in evidence. After discussing this part of the case the learned Sessions Judge said, "however as the lower Court's ground for discharging the first accused cannot be supported in view of the evidence of the petition, the order of the discharge of the first accused is set aside." Therefore, the order of the Sessions Judge is based upon the ground that fresh evidence is available which would establish the fact of instigation on the part of the petitioner and in view of that circumstance the matter should be reopened and enquired into afresh. Such a course is not ordi-

narily to be adopted by a revision Court. As pointed out by Sankaran Nair, J., in *Lakshmi Narasappa v. Mekala Venkatappa*[1],

"a power to order what is practically a re-trial, to give a complainant another opportunity of re-examining his witnesses and adducing fresh evidence ought not to be presumed, as it is unjust to the accused and opens a wide door to perjury and corruption."

The learned Judge observed :

"That the case is only one of discharge, which is not ordinarily at any rate a bar to a fresh prosecution, supports the same view as the injustice, if any, to the complainant may be thereby remedied."

These remarks are quite apposite to the present case. It is open to the respondent to file a fresh complaint forthwith on the same averments against the petitioner and to make the fullest use of the document upon which he is resting his present case in revision. That however is not a special or sufficient ground for the Court of revision to set aside the order of discharge or to direct a fresh enquiry.

The petition is allowed and the order of the Sessions Judge is set aside.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

The Salem Dayal Bagh Stores, Ltd., by Secretary, K. V. Radhakrishnan .. *Petitioner**

v.

The Governor-General in Council, South Indian Railway, by the General Manager and others .. *Respondents.*

Railways Act (IX of 1890), section 77—Notice of claim for compensation—Form and requisites—Mere letter intimating that goods had not arrived and asking that enquiries may be made—If sufficient as notice.

A mere letter by a consignee to the Railway company stating that the goods had not arrived and asking that enquiries might be made, cannot be regarded as a notice satisfying the requirements of section 77 of the Railways Act, when no claim for compensation was made in that letter.

The fact that in a short note to another Railway administration (G.I.P.) the Railway administration to whom the consignee's letter was addressed (S.I.R.) referred to the letter as if it were a claim cannot possibly amount to a proper notice to that Railway (G.I.P.) of a claim for compensation by the consignee.

Quaere.—Whether knowledge on the part of one Railway administration that notice had been served on another Railway administration can be sufficient to amount to a notice under section 77 of the Railways Act.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff, Salem, dated 25th September, 1944, in S. C. S. No. 21 of 1944.

T. Satyanarayana for Petitioner.

S. S. Ramachandra Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner was the plaintiff in S. C. S. No. 21 of 1944 in the Court of the District Munsiff of Salem. The suit was brought against five railway companies and the Governor-General of India in Council for compensation for loss of goods in transit. It was conceded that if the plaintiff was entitled to compensation, it was only from the second defendant, the Great Indian Peninsula Railway, and the learned District Munsiff dismissed the suit on the ground that notice of the claim for compensation had not been given to the railway administration of the Great Indian Peninsula Railway within six months of the delivery of the goods for carriage as required by section 77 of the Indian Railways Act. The only question in this civil revision petition is, whether the notice required by section 77 was given or not?

1. (1907) 18 M.L.J. 57 : I.L.R. 31 Mad. 133.

* C. R. P. No. 236 of 1945. 29th March, 1946.

It cannot be disputed that no specific notice of a claim for compensation under section 77 was given to the railway companies who were impleaded as defendants within six months of the delivery of the goods for carriage. It is argued, however, for the petitioner that the letter, Ex. P-3, dated the 20th March, 1943, written by the petitioner to the Chief Commercial Superintendent of the South Indian Railway Co. amounts to a notice of the claim so as to satisfy the conditions of section 77 and that so far as the Great Indian Peninsula Railway Co. is concerned they should be deemed to have had notice because the notice of claim sent to the South Indian Railway Co. was communicated by that company to the Great Indian Peninsula Railway Co. In my opinion Ex. P-3 cannot be regarded as a notice satisfying the requirements of section 77. It makes no claim for compensation at all, and is merely a letter stating that the goods had not arrived and asking that enquiries might be made. It is true that it appears from the correspondence between the South Indian Railway Co. and the Great Indian Peninsula Railway Co. that the South Indian Railway Company have referred to this letter Ex. P-3 as if it were a claim. In a letter to the Great Indian Peninsula Railway Co., dated the 16th of June, 1943, it is said :

"Please note that in respect of the above consignment I have received a claim dated 20th March, 1943, for not specified non-receipt of one parcel leather suit case."

It seems to me, however, quite impossible to hold, even if knowledge on the part of one railway administration that notice had been served on another railway administration can be sufficient to amount to a notice under section 77, that the Great Indian Peninsula Railway had such notice in this case. When no claim for compensation was made to the South Indian Railway Co. the fact that in a short note to the Great Indian Peninsula Railway administration the South Indian Railway administration have referred to the letter Ex. P-3, as if it were a claim cannot possibly amount to a proper notice to the Great Indian Peninsula Railway administration of a claim for compensation by the petitioner.

Learned counsel for the petitioner has referred me to the decision of a Full Bench of this Court in *Mahadeva Iyer* v. *South Indian Railway Co.*[1] which, he says, supports his contention that knowledge on the part of the Agent or Manager of the railway administration within the specified time is sufficient. As I have already said, it does not seem to me that on the facts of this case the Great Indian Peninsula Railway administration had knowledge of the claim within the specified time. There was no question in *Mahadeva Aiyar* v. *South Indian Railway Co.*[1] that the notice served was not in proper form. The substantial question was whether the Agent had notice under section 77 because the notice had been served on a subordinate of his.

I agree with the learned District Munsiff that there was no proper service of notice : the petition is dismissed with costs.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Kempamma .. *Appellant**

v.

Racha Setty and others .. *Respondents.*

Limitation Act (IX of 1908), section 20—Payment by mortgagor towards mortgage debt—Effect—When starts fresh period of limitation as against an item of the mortgaged properties which had been alienated before the date of such payment.

Where a mortgagor after alienating one of the four items but while still in possession of the remaining three items of mortgaged properties makes a payment to the mortgagee, a fresh period

1. (1921) 42 M.L.J. 202 : I.L.R. 45 Mad. 135 (F.B.).

* S. A. No. 143 of 1945. 9th January, 1946.

of limitation would start in favour of the mortgagee as against all items of mortgaged properties including the one which the mortgagor had alienated before his making the part payment.

So long as the mortgagor has not parted with his interest in the mortgaged properties and continues to be liable under the mortgage he can make a payment which will serve under section 20 of the Limitation Act to start a fresh period of limitation.

Pavayi v. *Palanivela*, (1940) 1 M.L.J. 766 : I.L.R. (1940) Mad. 872 (F.B.); *Thayyanayaki Ammal* v. *Sundarappa*, (1941) 2 M.L.J. 913 and *Narayana Reddiar* v. *Venkatesa Reddiar*, (1943) 1 M.L.J. 135, referred to.

Appeal against the decree of the District Court of Coimbatore in A. S. No. 184 of 1944, preferred against the decree of the Court of the District Munsiff of Kollegal in O. S. No. 68 of 1943.

P. N. Appuswami Aiyar for Appellant.

Respondents not represented.

The Court delivered the following

JUDGMENT.—This second appeal preferred by the plaintiff raises a question of limitation with reference to a mortgage and we are concerned only with item 3. The suit was dismissed as regards this item on the ground that it was barred by limitation. The mortgage was on 20th August, 1919. In 1920, this item 3 was sold to the fifth defendant under Ex. D-1. Items 2 and 4 were sold in favour of the second defendant in 1937 under Ex. D-3. To save the suit from the bar of limitation, a payment of Rs. 36 by the first defendant's father as the mortgagor, made on 12th August, 1931, and endorsed on the deed was relied upon. Defendants 2 and 5 contested the suit, raising various defences. The plea raised by the fifth defendant that the suit was barred as regards item 3 because the payment by the father was long after its alienation in his favour, was accepted by the Courts below.

There is a difference between an acknowledgment of liability under section 19 and a payment under section 20 of the Limitation Act. On the date of the payment, namely, 12th August, 1931, the first defendant's father remained the mortgagor, having possession of items 1, 2 and 4, though he had parted with item 3 long before. The Full Bench decision in *Pavayi* v. *Palanivela*[1] gives rise to some doubt whether in such a case it could not be successfully urged that the suit was barred, but two later decisions have made it abundantly clear that, if a payment is made under section 20 of the Act by the person liable to pay, a fresh period of limitation would start in favour of the creditor. The decisions are *Thayyanayaki Ammal* v. *Sundarappa*[2] and *Narayana Reddiar* v. *Venkatesa Reddiar*[3]. The second decision accepts the interpretation of the Full Bench decision, given by Wadsworth and Patanjali Sastri, JJ. The Chief Justice delivered the judgment in the Full Bench case as well as in *Narayana Reddiar* v. *Venkatesa Reddiar*[3]. The principle is that so long as the mortgagor has not parted with his interest in the mortgaged properties and continues to be liable under the mortgage, he can make a payment which will serve under section 20 of the Limitation Act to start a fresh period of limitation.

The view taken by the lower Courts is wrong and this appeal will stand allowed as regards item 3 with costs payable by the fifth defendant throughout, proportionate to the value of item 3.

It may be mentioned that the respondents did not appear at the hearing of this appeal. The fourth respondent is dead. The fifth respondent disowned any interest in the suit properties. Respondents 1 and 3 were personally served and the second respondent refused notice.

K.S. *Appeal allowed.*

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1. (1940) 1 M.L.J. 766 : I.L.R. (1940) Mad. 872 (F.B.).
2. (1941) 2 M.L.J. 913.
3. (1943) 1 M.L.J. 135.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE BELL.

Gadiraju Bangarayya and another .. *Appellants**

v.

Gottemukkula Ramabhadriraju .. *Respondent.*

Arbitration Act (X of 1940), section 33—Award—Objection by defendant—Whether an application to set aside award—Irregularity to be condoned.

In a dispute an award was filed, and on that date the Court posted the suit to another date for objections and the defendants filed objections but the plaintiff remained quiet. On the next date of hearing, the Court felt that the defendants should have filed an application to set aside the award under section 33 of the Arbitration Act instead of merely setting out the objections with the aim of setting aside the award and so dismissed the objections and passed a decree in terms of the award.

Held, that on a perusal of the defendants' objections they disclosed the defendants' intentions to have the award set aside and they were not only in substance an application to set aside the award, but it was almost so in form and the mistake made by the defendants was to a large extent due to the order passed by the lower Court when posting the case to a later date. It was only an irregularity that should have been overlooked.

Gopalji Kalliangi v. *Chhaganlal Vithalji*, (1920) I.L.R. 45 Bom. 1071 and *Deokinandan Dalmia* v. *Basantlal Ghanshyamdas*, I.L.R. (1941) 2 Cal. 123, referred to.

Appeal against the decree of the Court of the Subordinate Judge, Narsapur, in O. S. No. 5, of 1943.

C. A. Md. Ibrahim and *T. S. Santhanam* for Appellants.

P. Satyanarayana Raju for Respondent.

The Judgment f ε e Court was delivered by

Horwill, J.—The matter in dispute in O. S. No. 57 of 1943 was referred to arbitrators and an award was filed on 21st November, 1944. On that date, the Court posted the suit for objections to 2nd December, 1944. On the adjourned date, the defendants filed objections; but the plaintiff was satisfied with the award and filed none. It was then posted for enquiry to 11th January, 1945. On that date, a preliminary objection was taken by the plaintiff that the objections of the defendants could not be heard; because under section 33 of the Arbitration Act the Court was bound to pass a decree in terms of the award, unless a party applied to the Court to have the award set aside. The learned Subordinate Judge upheld this objection, rejected the objections filed by the defendants, and passed a decree in terms of the award.

It is not denied in this Court that the appellants should have filed an application to set aside the award; but they can reasonably say that they were misled by the order of the Court on 21st November, 1944, posting the suit to 2nd December, 1944, for objections. In substance, the objections of the appellants amounted to an application to the Court to set aside the award. They headed the objections "objections filed by the second defendant on the award." They then set out various grounds on which, they considered, the Court should set aside the award. In paragraph 13 they stated, "the award of the arbitrator may therefore be set aside." Not only were the objections of the appellants in substance an application to set aside the award, but it was almost so in form. If an application had been filed as required by section 33 of the Arbitration Act, the second defendant would have headed his application "application under section 33 of the Arbitration Act" instead of "objections filed by the second defendant on the award." He would have stamped his application and would have said in paragraph 13 of his application, "It is therefore prayed that this Honourable Court will be pleased to set aside the award of the arbitrators", instead of "the award of the arbitrator may therefore be set aside." We feel that since the mistake made by the second defendant was to a large extent due to the order passed by the lower Court, the lower Court should have overlooked this irregularity; for it was nothing more than an irregularity.

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* A. A. O. No. 378 of 1945. 10th January, 1947.

The learned advocate for the appellants has drawn our attention to two cases in which the Court was prepared to overlook an irregularity in the form of the application. In *Gopalji Kallianji* v. *Chhaganlal Vithalji*[1] where there should have been an application to set aside the award, there was only an affidavit. In *Deokinandan Dalmia* v. *Basantlal Ghanshyamdas*[2], the learned Judge, sitting on the original side, was prepared to treat a plaint filed in a suit that was not maintainable as an application. We also feel that the irregularity committed by the appellants was not such as to entitle the Court to overlook their objections and to pass a decree in terms of the award.

The appeal is therefore allowed, the order of the lower Court set aside, and the Court ordered to hear the objections of the appellants after giving notice to the other side. As the difficulty is in part due to the fault of the appellants, there will be no order as to costs.

K.C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE BELL.

Nagi Reddi Seetharami Reddi and another .. *Appellants**

v.

Thikkavarapu Kotamma and others .. *Respondents.*

Civil Procedure Code (V of 1908), sections 41 and 48—Transfer of decree to another Court—Application to Court which passed decree for an order re-transferring it—Step-in-aid of execution—Substantive application for execution—Forum.

An application may always be made to the Court which passed the decree for an order re-transferring it if it has been transferred elsewhere and such an application is a step-in-aid of execution and prevents limitation running against the decree-holder. But a Court to which a decree is sent for execution is the only Court which has seisin of the execution proceedings, and it retains its jurisdiction to execute the decree till it certifies under section 41 of the Civil Procedure Code, to the Court which passed the decree, the fact of execution, or if it fails to execute the decree, the circumstances attending such failure. In such a case the Court which passed the decree has no jurisdiction to entertain an execution application unless concurrent execution had been ordered or proceedings in the Court to which the decree was sent, had been stayed for the purpose of executing the decree in the former Court.

Case-law discussed.

Appeal against the order of the District Court, Nellore, dated 1st August, 1945, in E. P. No. 15 of 1945 in O. S. No. 91 of 1932.

K. Krishnamurthi for Appellants.

P. Chandra Reddi for Respondents.

The Judgment of the Court was delivered by

Bell, J.—This appeal arises out of an execution petition No. 15 of 1945, filed in the District Court of Nellore, in O. S. No. 91 of 1932. The decree-holders obtained their decree on 6th December, 1932, and in the course of subsequent execution proceedings it was, in 1933, transferred for execution to the District Munsiff's Court, Nellore. On 4th December, 1944, within two days of the period of limitation laid down by section 48 of the Code of Civil Procedure, the execution petition now in question was filed, the decree-holders asking : (*a*) that the decree transmitted in 1933 to the District Munsiff's Court should be ordered to be re-transmitted to the District Court; (*b*) for the issue of notice to the judgment-debtors and (*c*) for attachment and sale of their immoveable properties. On 1st August, 1945, the District Judge made the following order :

"It is open to the applicant to treat this petition as a step-in-aid of execution and invoke its aid when he files the next execution petition. But he cannot ask me to treat this as a substantive execution application when the decree has been transferred and there is no decree before me to execute and the copy of the decree with the non-satisfaction certificate has not been returned by the District Munsiff's Court, Nellore. This petition is therefore incompetent and is hereby dismissed."

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1. (1920) I.L.R. 45 Bom. 1071. 2. I.L.R. (1941) 2 Cal. 123.

* A. A. O. No. 706 of 1945. 10th January, 1947.

The District Judge is thus saying that while he would have made an order *simpliciter* for re-transfer of the decree, yet he could not allow a substantive execution application which E. P. No. 15 of 1945 was in form.

Counsel for the appellants has cited a number of cases in support of his contention that although a decree may have been transferred for execution to another Court, the decree-holder nevertheless can always present an execution petition to the Court which passed the decree. He contends therefore that despite the fact that the decree in the present case had been transferred to the District Munsiff and was still in his Court and that no certificate had been returned in accordance with section 41 of the Code of Civil Procedure, yet the District Judge was competent to entertain it and ought to have entertained it in the fullest possible way as an execution petition.

He has cited a number of cases in Madras, *viz.*, *Maharaja of Bobbili* v. *Narasaraju Peda Balaria Simhulu Bahadur*[1], *Subbarao* v. *Ankamma*[2] and *Seeni Nadan* v. *Muthuswami Pillai*[3] which support the view, which indeed we think to be well settled, that an application may always be made to the Court which passed the decree for an order re-transferring it if it has been transferred elsewhere and that such an application is a step-in-aid of execution and prevents limitation running against the decree-holder. The first sentence therefore of the District Judge is correct.

The further question whether the District Court can execute the decree although the decree is in fact in the custody of another Court for execution, is not however to be answered in the appellant's favour upon the cases which have been cited to us. Three cases may be mentioned at once which at first sight are somewhat in favour of the appellant's contention. The first is *Makkanlal* v. *Bhagwan Kuer*[4]. There a decree had been transferred for execution against certain property to a Court other than the Court which passed the decree and the property was attached in that other Court. Nevertheless, the decree-holder applied to the decreeing Court for execution by arrest of the judgment-debtor. It was held that while the law was well settled that execution against the same property cannot take place in two Courts at one and the same time, there is, however, no bar to execution in one Court against the immoveable property and in another Court by other means. In *Fatechand Rampratap* v. *Jitmal Rupchand*[5], a single Judge held that the Court which passes a decree has jurisdiction to pass orders in execution proceedings notwithstanding that the decree has been transferred for execution to another Court. An analysis of the learned Judge's reasoning however leads one to the view that the proposition which he intends to lay down is not quite as wide as expressed above and that his decision goes no further than saying that because a decreeing Court has made an order of transfer it has not thereby deprived itself entirely of jurisdiction in respect of the decree which it has itself passed. Reliance was placed on *Kanti Narain* v. *Madan Gopal*[6], a Full Bench case, in which the material question which was asked was "when a money decree has been transferred by the Court which passed it for execution to another Court, is an application to the first Court (*a*) to execute the decree, (*b*) to transfer it to another Court for execution and (*c*) to transfer it for execution to the same Court, not a valid application unless the proceedings taken in the other Court have first been reported and certified by that Court?" In a lengthy judgment it was decided that it was a valid application and was a step-in-aid of execution so as to save limitation. By a majority it was held that even without a certificate by the Court to which the decree has been transferred, nevertheless the transferring Court could consider an application for re-transfer and could presumably therefore grant the application which in this particular case had been made to it. It is, however, quite clear from the judgment in this case that not until the end of the arguments did it become known to the Court that the application which it was considering was an application not only for re-transfer

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1. (1916) 31 M.L.J. 900 : L.R. 43 I.A. 238 : 821 (F.B.). I.L.R. 39 Mad. 640 (P.C.).
2. (1932) 63 M.L.J. 788.
3. (1919) 37 M.L.J. 284 : I.L.R. 42 Mad.
4. (1936) A.L.J. 277.
5. (1929) I.L.R. 53 Bom. 844.
6. A.I.R. 1935 Lah. 465 (F.B.).

but also for execution. It appears to us, reading the judgment, that the arguments were based mainly on the application for transfer, and were in the main directed to the question whether or not, as such, it was a step-in-aid of execution.

An earlier case in the same High Court *Rulia Ram* v. *Diwan Chand*[1] which appears to deal directly with the point now before us, was not accepted by the majority of the Full Bench, but it seems to us, with great respect, to be preferable. In this case, it was held that,

"Where a decree is transferred for execution, the original Court is not wholly divested of its jurisdiction but can still re-transfer the proceedings to itself or to some other Court. Where, however, a decree is transferred for execution without any limitation, the original Court has no longer the power to execute the decree until and unless the decree is returned by the transferee Court with a certificate of non-satisfaction."

Reference is made in the judgment to *Jatendrakumar* v. *Mahendrachandra*[2] where the same view was expressed after considering the Privy Council decision in *Maharaja of Bobbili* v. *Narasaraju Peda Balaria Simhulu Bahadur*[3]. In *Maharaja of Bobbili* v. *Narasaraju Peda Balaria Simhulu Bahadur*[4], it was held that:

"A Court to which a decree is sent for execution is the only Court which has seisin of the execution proceedings, and it retains its jurisdiction to execute the decree till it certifies under section 41 of the Civil Procedure Code, to the Court which passed the decree, the fact of execution, or if it fails to execute the decree, the circumstances attending such failure. In such a case the Court which passed the decree has no jurisdiction to entertain an execution application unless concurrent execution had been ordered or proceedings in the Court to which the decree was sent, had been stayed for the purpose of executing the decree in the former Court."

This case has been widely discussed on many occasions, and not least, in the Privy Council to which it went on appeal: *Maharaja of Bobbili* v. *Narasaraju Peda Balaria Simhulu Bahadur*[3]. However it may have been shaken in other respects, in our opinion, on this particular point it was not overruled, and the proposition quoted above may be taken to be well-settled law in this Court.

In *Abdul Hafiz Sahib* v. *Abdul Sukkur Sahib*[5], for example, Varadacharia J., accepts the proposition as being perfectly clear and well understood and says at page 604 after referring to the provisions applicable in the Code:

"Taking these three provisions (*viz.*, section 38, Order 21, rule 10, and section 42, Civil Procedure Code) together, it seems to me that their natural effect is that, unless in the order of transfer there is any express limitation of the purpose for which the transfer is made—assuming that such limitation, if any, can control the provisions of the Code as to jurisdiction—there is no reason to limit the powers of the Court to which a decree has been transferred for execution. Indeed it is possible to construe the observations of the Judicial Committee in *Maharaja of Bobbili* v. *Narasaraju Peda Balaria Simhulu Bahadur*[3], as depriving the original Court of jurisdiction to execute its decree once the decree has been sent to another Court for execution till the certificate under section 41 is received from the transferee Court."

This view, moreover, is supported not only in the Calcutta and Patna High Courts but also in many decisions of the Bombay High Court.

In the result we hold that the learned District Judge was right in saying that he has no power to execute this decree in the absence of a certificate from the Court to which it has been transferred. If the appellants had been satisfied with an order for re-transfer intending, on the re-transfer of the decree, to present an execution petition, they would have been in order. They insisted, however, on having their petition dealt with as a substantive execution petition and so rightly failed. In the circumstances of this particular case the result is that the appellants are completely out of time for presenting an execution petition, because of the limit prescribed by the Code and no order in their favour now for re-transfer of the decree would be of any use to them.

The appeal is therefore dismissed with costs.

V.P.S. *Appeal dismissed.*

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1. (1934) I.L.R. 16 Lah. 80.
2. (1933) I.L.R. 60 Cal. 1176.
3. (1916) 31 M.L.J. 300 : L.R. 43 I.A. 238 : I.L.R. 39 Mad. 640 (P.C.).
4. (1912) 23 M.L.J. 236 : I.L.R. 37 Mad. 231.
5. (1937) 2 M.L.J. 602.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD MACMILLAN, LORD JUSTICE DU PARCQ AND SIR JOHN BEAUMONT.

His Holiness Peria Kovil Kelvi Appan Thiruvenkata Ramanuja Pedda Jiyyangarlu Varlu .. *Appellant**

v.

Prathivathi Bhayankaram Venkatacharlu and others .. *Respondents.*

Temple—Rituals and ceremonials in regard to the conduct of services in—Custom and practice—Members of Vadagalai and Thengalai cults participating in common worship—Right of Vadagalais to recite their own special invocation manthram and Vazhi Thirunamam simultaneously with those of the Thengalais at the service—Suit in regard to the right to regulate the conduct of services in temples—Cognizability by Civil Court.

The question at issue was whether the Vadagalais who were entitled to be present and take part along with the Thengalais in the service in the group of the Thirumalai and Tirupathi temples, were also entitled to use their own and distinctive Vadagalai invocation manthram at the beginning of the service and to recite their own Vazhi Thirunamam or benediction at the close of the service concurrently with the Thengalais who alone have the right to begin the service by reciting their own invocation manthram and end it by reciting their own and distinctive Vazhi Thirunamam.

Held, the rights of parties depend upon custom and practice. In a matter of this nature where feeling is easily inflamed little reliance can be placed on the oral testimony of partisans on one side or the other. The right to participate in the worship of a temple does not necessarily carry with it the right to insist on using a ritual other than the ritual in use in that temple. There has been no instance of the judicial establishment of a right on the part of the Vadagalais and the Thengalais to use competitive rituals simultaneously at the service in a temple. The successful establishment of such a claim by either cult would not be conducive to the orderly and reverent conduct of the temple service.

In the circumstances, in the temples in suit, both Thengalais and Vadagalais may join in the service, but the Thengalais alone are entitled to open the service with their own and special invocation manthram only and the Vadagalais are not entitled to recite their special invocation manthram simultaneously and the service must also be concluded similarly by the recitation of Thengalai Vazhi Thirunamam alone.

The contention that a suit to establish the right to conduct the service in a temple in a particular manner is not cognizable in a Civil Court is untenable.

Sir Herbert Cunliffe, K.C. and *Subba Row* for Appellant.

Eddy, K.C., Ralph Parikh and *Ghaffur* for Respondents.

Their Lordships' Judgment was delivered by

LORD MACMILLAN.—Their Lordships address themselves in this appeal to the consideration of a controversy which in one form or another has agitated the Hindu religious community in the Presidency of Madras for upwards of two centuries. The main question between the parties relates to the right to regulate the conduct of the services in an important group of temples. To the understanding of the issue a short historical survey is essential.

According to the Hindu creed the Deity manifests Himself in three aspects as Brahma the Creator, Vishnu the Preserver, and Siva the Destroyer and Renovator. Those who are devoted to the worship of the Deity in His aspect as Vishnu are known as Vaishnavas and there are many temples, especially in Southern India, dedicated to the worship of Vishnu and known as Vaishnavite temples. The earliest Scriptures, d ting from 2,500 years ago, are the Sanskrit Vedas or hymns, held sacred by all Hindus. A further series of sacred writings known as Prabandhams consisting of 4,000 compositions in the Tamil language, was compiled in later times by certain Alwars who were Vaishnava devotees in Southern India. Subsequently the Acharyas or learned Brahmins acted as religious preceptors. Of these the most famous was Ramanuja who flourished between 1017 and 1137 A.D., Vedanta Desikar who flourished between 1268 and 1369 A.D. and Manavala Mahamuni who lived between 137 and 1443 A.D. These Acharyas composed a number of Sanskrit verses in praise of the Deity called Sthothra Patams. The Prabandhams at an early date became part of the ritual of the Vaishnavite temple

* P.C. Appeal No. 33 of 1943. 13th May, 1946.

services and later the Sthothra Patams were also recited on special occasions. The Alwars and Acharyas, the authors of the Prabandhams and Sthothra Patams, became themselves objects of worship in the temples.

About the fourteenth century there appears to have arisen a difference of view among the Vaishnavites. One section, the followers of Vedanta Desikar, specialised in the study and exposition of the Sanskrit Vedas and regarded the Alwars and their Prabandhams as entitled to less reverence. These became known as Vadagalais or followers of the Northern cult. The other section, the followers of Manavala Mahamuni, specialised in the study and exposition of the Tamil Prabandhams of the Alwars and became known as Tengalais or followers of the Southern cult. It is important to bear in mind that both derive from and share a common religious origin and faith and that while each adheres to its own school of thought neither of them contemns or rejects the sacred character of the other's cult.

In some of the Vaishnavite temples in the Presidency of Madras the Vadagalai cult prevails, in others the Tengalai cult. The question which shall prevail in particular temples has been the subject of frequent dispute and on several occasions of litigation. While the order of service is much the same in both classes of temples there are certain distinctive features of the Vadagalai and the Tengalai rituals respectively and it is with regard to the observance of these distinctive features that the present litigation is concerned.

The temples to which this appeal relates are eighteen in number, one group of five in Tirumalai and another group of thirteen in Tirupathi, all in the Chittoor district of Madras. The conduct of the services in these temples is under the charge of what is known as the Adhyapakam office. At its head as president is the plaintiff, now the appellant, known as Pedda Jiyyangar, who may be described as the high priest. He is a Tengalai. He is assisted in the performance of his duties by a Chinna or Junior Jiyyangar, four Ekangis, and certain minor assistants called Adhyapakas and Acharya-purushas. These with the general body of ordinary worshippers when met in assembly constitute the Adhyapaka Goshti or congregation. There is now no question as to the authoritative and predominant position occupied by the appellant. It is in connection with the extent and nature of his rights in the conduct of the service that controversy has arisen.

The order of worship in these, in common with other, Vaishnavite temples follows well-recognised lines. First the Pedda Jiyyangar opens the service by saying "Sadit Arula" (please begin). Then follows the invocation of the patron saint consisting of five stanzas known as the manthram or pathram. The first stanza according to the Tengalai cult begins with the words "Sri Sailesa Dayapathram" and invokes the Tengalai guru Manavala Mahamuni. According to the Vadagalai cult the first stanza begins with the words "Ramanuja Dayapathram" and invokes the Vadagalai guru Vedanta Desikar. The remaining four stanzas are common to both. After the manthram or invocation comes the recitation of selected passages from the Prabandhams appointed for the day, each prefaced with a laudatory verse in praise of its author. The Prabandhams are common to both sects. At the conclusion of the recitation of the Prabandhams benedictory verses called Vazhi Tirunamam are recited, consisting of nine stanzas of which the first four are common to both sects while the last five differ.

This outline of the service is probably sufficient to disclose the substantive divergence between the two rituals. It is the preliminary invocation or manthram which, so to speak, strikes the note of the service which follows, as being an act of devotion or worship in the one case in honour of the Vadagalai guru and in the other of the Tengalai guru. Hence its importance to the worshipper.

The respondents representing the Vadagalais do not challenge the right of the plaintiff and the Tengalai worshippers to recite their own manthram and invoke their own guru at the beginning of the service or indeed to conduct their worship throughout according to their own ritual. What they maintain is that this right is not exclusive and that they have a concurrent right to recite simultaneously their own manthram and throughout to observe their own ritual where

it differs from that of the Tengalais. The Tengalais do not dispute the right of the Vadagalai worshippers to be present and take part in the services but they maintain that if they do attend the services they must conform to the Tengalai ritual or remain silent and in any event that they have no right to interfere with the Tengalai service by using simultaneously their own ritual where it differs. The success of the Vadagalai claim would not seem to conduce to the orderly and reverent conduct of the temple service. It is not surprising that the insistence of the Vadagalais on observing their own ritual in competition with the Tengalai ritual has led to disturbances and has been resisted by the appellant and those associated with him who are responsible for the worship of the temples. There are in Madras temples where the Tengalai ritual is admittedly used exclusively and where if Vadagalais attend the service they must refrain from using their own ritual; and there are temples where the Vadagalai ritual is admittedly used exclusively and where if Tengalais attend the service they in turn must refrain from using their own ritual. So far as their Lordships are aware there has hitherto been no instance of the judicial establishment of a right on the part of the Vadagalais and the Tengalais to use competitive rituals simultaneously at the service in a temple.

The rights of the parties depend upon custom and practice. In a matter of this nature where feeling is easily inflamed little reliance can be placed on the oral testimony of partisans on one side or the other and counsel at their Lordships' bar almost entirely discarded the oral testimony in the case. Both sides agreed that the documentary evidence was what mattered and on it each side claimed the verdict. On the documents the Vadagalais maintained that the Tengalais had failed to prove the exclusive right which they claimed.

A vast mass of documents and records of litigations has been accumulated. It has been exhaustively analysed and criticised both by the Subordinate Judge who heard the case in the first instance and in the judgment of the High Court (Madhavan Nair and Stodart, JJ.), with the result that on the main question of the use of the manthram or invocation the Subordinate Judge decided in favour of the appellant and the High Court in favour of the Vadagalai respondents. Their Lordships have had their attention directed to all the relevant documents and to the observations thereon in both Courts. Counsel on each side have assisted their Lordships by selecting for consideration the documents on which they respectively relied as being of material significance and to these or at least to the most important of them it will be sufficient to refer.

The appellant relies first on a document dated 1795 (Exhibit A). It appears from this document, which is stated to have been approved in the Huzur, that some Vadagalais in connection with the funeral rites of one of their number had recited the verse beginning "Ramanuja Dayapathram" in the Tiruchanoor temple, another Vaishnavite temple in Madras. It is recorded that they were taken to task for this and "having been made to learn that it was wrong to recite Ramanuja Dayapathram in the temple they went away making an agreement that if necessary they would in future do so in their own respective houses as was done in Tirumalai and Tirupathi but not in the temple and that if they should so recite it they would be rendering themselves culpable." This document has been produced in other proceedings and accepted as genuine. The Subordinate Judge states that it is "beyond the reach of criticism" and their Lordships are not impressed by the adverse comments made upon it in the High Court. The point of the document for the present purpose is that it records so long ago as 1795 that it was not permitted to recite Ramanuja Dayapathram in the Tirumalai and Tirupathi temples. It is also important, as will appear in the sequel, in that it recognises identity of practice as between the temple at Tiruchanoor and the Tirumalai and Tirupathi temples, which are mentioned in association in a number of the documents.

Next comes a takid from the Collector of North Arcot in 1832 (Exhibit H) which confirms that in the case of the Tiruchanoor Vadagalais "Ramanuja Dayapathram manthram should be recited in their respective houses and that nothing contrary should be done."

More important is the litigation regarding the Tiruchanoor temple in 1887-1893. In this suit the Pedda Jiyyangar of Tirumalai Tirupathi and certain other residents in Tirupathi, suing in a representative capacity, claimed *inter alia* the exclusive right to recite the Tengalai manthram in the Tiruchanoor temple. The munsiff before whom the case came in the first instance after a most searching investigation of all the documentary evidence satisfied himself that the practice in the temple at Tiruchanoor was identical with the practice in the temples of Tirumalai and Tirupathi and expressly found " that the members of the Vadagalai sect are not entitled to utter the Vadagalai manthram called " Ramanuja Dayapathram " jointly with the Tengalais or separately but that the Vadagalais are at liberty to utter it in their own houses but not before the Goddess." Thus although the case related to Tiruchanoor the decision was based on the practice of Tirumalai and Tirupathi and is consequently of the highest significance as evidence of the usage of the temples in suit over half a century ago. On an appeal to the District Court of North Arcot the documentary history of the matter was again most closely scrutinised, the intimate association of the Tiruchanoor temple (which is about three miles from Tirupathi) with the temples in suit was emphasised and the decision of the munsiff confirmed as in accordance with " the custom sanctioned by old usage." In the judgment a document of 1853 is quoted in which the Mahant expressly says that Tiruchanoor " is included in Tirupathi and Tirumalai Devasthanam." On further appeal to the High Court the decisions of the Courts below were affirmed. The judgment of the High Court concludes thus : " It is alleged that [the Vadagalais] have great respect for the Tengalai saint in whose honour the verse is recited and they only want the religious privilege of being able to recite their own verse in the presence of the Deity. It appears to us that this professed respect for the saint is accompanied by a good deal of hostility to the saint's worshippers and that the permission could result in nothing but a breach of the public peace. All the evidence goes to show that by established custom the Ramanuja Dayapathram should not be recited and we think the decision of the Courts below is right."

In 1915 another important judgment was pronounced by the District Judge of North Arcot in a suit in which the Pedda Jiyyangar and others on behalf of all Tengalai Brahmins resident in Tirumalai, Tirupathi and Tiruchanoor claimed that in the temples in these places the Tengalai manthram was alone permissible. The Subordinate Judge held that both manthrams might be repeated side by side but the District Judge reversed this decision and held that only the Tengalai manthram was permissible.

Meantime there had been a series of other litigations between Tengalais and Vadagalais relating to other temples elsewhere in which the same issue was contested. The report of a case affecting the great temple at Conjeevaram is particularly instructive (*Krishnasami Tatacharyar* v. *Krishnamacharyar*[1]). The suit was brought to restrain the Vadagalais from introducing their manthram in the temple service. The claim of the Vadagalais to do so was asserted, as in the present case, to be justified by usage. After a full investigation the exclusive right of the Tengalais to the use of their manthram in the services was established.

In the case of *Srinivasa Thathachariar* v. *Srinivasa Aiyangar*[2], relating to the temples at Tinnevelly it was held by the High Court, affirming the judgment of the Subordinate Judge, that the Vadagalais were not entitled to interfere with the Tengalai ritual and must not repeat their Ramanuja Dayapathram at the beginning or their Vazhi Tirunamam at the end of the services. The Officiating Chief Justice (S. Subramania Aiyar) says at p. 359 : " Now judging from the instances of dispute between Tengalais and Vadagalais which have come not infrequently before the Courts in connection with other temples the rule seems to be that but one patram is used on similar occasions." When the High Court had again to consider the question in relation to a temple at Conjeevaram (*Thiruvengadachariar* v. *Krishnaswami Thathachariar*[3]) the history of the controversy was very fully examined and the exclusive right of the Tengalais to use

1. (1882) I.L.R. 5 Mad. 313.
2. (1899) 9 M.L.J. 355.
3. (1915) M.W.N. 281.

their own manthram was affirmed. The learned Judges observe that the judgment of the High Court in the abovementioned case in the ninth volume of the Madras Law Journal "holds that only one manthram can be recited in a temple. This appears also reasonable." The exclusive rights of the Tengalais were further clarified in the case of *Appadorai Aiyangar* v. *Annangaracharia*r[1].

The present troubles affecting the temples in suit seem to have originated about 1901 in an assertion by the Vadagalais of the rights which they now claim. In May of that year the superintendent of the Tirupathi temple complained to the mahant that the Vadagalais contrary to the custom of the temple were "newly" reciting their own manthrams and that disputes were greatly increasing. A further complaint was made in 1904 and the mahant made a representation to the local magistrate that there was a risk of disturbance owing to the insistence of the Vadagalais in employing their own ritual contrary to usage. In 1905 the matter was taken into Court on a plaint by the Tengalais against the Vadagalais on the lines of the present suit. The Subordinate Judge of North Arcot found in favour of the joint use by each sect of its own manthram, but his judgment was reversed by the District Judge of North Arcot. "Upon the evidence," he said, "I must find that it has not been the custom to recite the Ramanuja Dayapathram." On a further appeal to the High Court the action was dismissed on a technical plea of misjoinder of parties without any opinion being expressed on the merits. Then came the present suit.

The case for the defence, like that for the plaintiff, was almost entirely based on the documentary evidence. Their counsel began with a reference to certain early documents of 1730, 1737 and 1786 (Exhibits XXIV, XXIV*a* and XXIV*b*). But these relate to the Vedanta Desikar temple in which admittedly the service is conducted exclusively according to the Vadagalai ritual. It is significant to note, however, that they appear to recognise the propriety of the attendance of Tengalais at the services in this exclusively Vadagalai temple although Ramanuja Dayapathram is alone recited there. The right of both Tengalais and Vadagalais to worship in the Tirumalai and Tirupathi temples is also recognised but nothing is said as to the manthram used there and if any inference is to be drawn it would rather seem to be that the Tengalai manthram was alone employed there. Their Lordships were referred to other documents in support of the Vadagalai claim. They are discussed in great detail in the judgments of the Subordinate Judge and the High Court. Many of them are equivocal, none is conclusive. That their import is ambiguous is best evidenced by the fact that a careful study of them led the Subordinate Judge to one conclusion and the High Court to a different conclusion. No useful purpose would be served by going through them again in detail. It is enough to say that their Lordships find themselves in several instances unable to agree with the inferences—for they are only inferences—which the learned Judges of the High Court draw from them in favour of the defendants, and that they are generally in agreement with the view taken of them by the Subordinate Judge. On the other hand their Lordships are not convinced of the validity of the criticisms expressed by the Judges of the High Court depreciatory of the documentary evidence favourable to the plaintiff. Their Lordships are much more impressed by the fact that, so far as they are aware, in the whole series of litigations in Madras on this vexed question the Vadagalais have in no instance succeeded in establishing a right to the joint use of both manthrams in any temple, and that nowhere in the documents is there definite evidence of such joint usage.

There is one consideration of general importance which appears to have greatly influenced the decision of the High Court and to which their Lordships think it right to draw special attention. The learned Judges very properly take note of the admitted and undoubted right of the Vadagalais to participate in the services in the temples in suit. From this they would seem to infer that they must have the right to use their own manthram. The reasoning is that as the manthram or invocation is the keynote of the service the Vadagalais could not participate in

1. (1939) 1 M.L.J. 124.

the service at all unless permitted to use their own manthram. In short, to forbid the Vadagalais to recite their own manthram in the temples would be tantamount to excommunicating them altogether from the services. Their Lordships do not agree with this view or with the argument founded upon it. In point of fact the right to participate in the worship of a temple does not necessarily carry with it the right to insist on using a ritual other than the ritual in use in that temple. The reported cases consistently recognise the right of the Vadagalais to participate in the worship of temples conducted according to the Tengalai ritual, but on condition of conforming with or at least not interfering with the Tengalai ritual, and it is nowhere suggested that this is a barren or self-contradictory privilege. When the Tengalais attend in the temple of Vedanta Desikar they may not use their own manthram there; when the Vadagalais attend in the temple of Tiruchanoor they may not use their own manthram. Among the documents in the present case there is a series of agreements dated between 1885 and 1889 whereby ekangis who were Vadagalais expressly undertook to conduct the services in the temples in suit according to the Tengalai ritual. It is thus made clear that it is not against conscience for Vadagalais to take part in services in which the Tengalai manthram is exclusively employed and that to hold that the Tengalai manthram alone must be used in the temples in suit does not mean, as the learned Judges of the High Court seem to think, the virtual exclusion of the Vadagalais from participation in the worship of the temples.

The learned Judges of the High Court belittle the probability of disturbance or unseemly incidents if both manthrams are used simultaneously. But no one can read the papers in this case or the judgments in the other reported cases without noticing the frequent references to disturbances between the rival sects when each has insisted on using its own ritual. Where feelings obviously run so high the risk of violent conduct is manifest. It may be that the nature of the services is such that both parties could recite their respective manthrams without very great mutual interference, but as the District Judge of North Arcot observed in one of the cases—"knowing the contentious spirit of the opposing factions, I am afraid there would never be peace between them."

A separate issue was raised with regard to one of the temples in suit, the sub-shrine of Tirumalai Nambi in Tirupathi. The contention of the Tengalai appellant was that in this temple the Tengalai manthram or pathram alone might be used while the Vadagalais contended that their manthram alone might be used. The learned Subordinate Judge found that both may be used simultaneously. This is a singular result to have reached in a case in which the rights of the parties depend upon custom for it is a finding in favour of a custom which neither party alleged. The Vadagalais acquiesced in the decision of the Subordinate Judge but the appellant challenged it in the High Court which accepted it and their Lordships have now to deal with the matter.

As in the opinion of the Subordinate Judge, and now of their Lordships, the appellant has established the exclusive right of the Tengalais to use their own manthram in all the other temples in suit, there would seem *prima facie* to be no reason to make an exception in the case of this temple unless there is clear justification for doing so. The Subordinate Judge after considering the meagre documentary evidence that has any bearing on the subject concludes somewhat haltingly—"I should think, reading these disinterested Amulunamas of the Vicharanakartha and Exhibits XXIV series together that both patrams are used to the exclusion of neither patram," and the High Court "think that this finding should be accepted." Their Lordships have examined the relevant documents. They do not find in the "disinterested Amulunamas of the Vicharanakartha" (Exhibits Y series) any reference to the manthram used in the Tirumalai Nambi Temple or indeed any special discrimination of this temple from the others. As for the Exhibits XXIV series, the significant thing is the express direction that in the Vedanta Desikar temple the Vadagalai manthram alone is to be used and no discrimination is made of the Tirumalai Nambi temple from the ot er Tirumalai and Tirupathi temples. Had this temple been in the exceptional, indeed, as their Lordships

hold, the unique position among the suit temples and so far as is proved among Vaishnavite temples in Madras generally of using both manthrams simultaneously, it is difficult to conceive why among the voluminous documents produced and in the numerous records of past litigations no express reference is to be found to this exceptional case. Both the Subordinate Judge and the High Court mention the Pedda Jiyyangar's Amulunamas (Exhibits AA series), of which the High Court says that they "no doubt support the case of the plaintiff," but both the Subordinate Judge and the High Court apparently regard them as being of little evidential value because they are subsequent to the Tiruchanoor dispute. This does not seem a convincing reason for disregarding them when it is remembered that the Tiruchanoor case was decided in favour of the Tengalais because the ritual of the Tirumalai and Tirupathi temples was held to rule there. Had the double use been the custom in one of the Tirumalai and Tirupathi temples the fact would surely have been brought out in the Tiruchanoor case. Their Lordships accordingly find that in the temple of Tirumalai Nambi, as in the other temples in suit, both Tengalais and Vadagalais may join in the service but the Tengalai manthram alone may be used.

A further question raised relates to the formula to be used in the benediction with which the service ends. Both the Subordinate Judge and the High Court have held "that the plaintiff and the other Adhyapakam office holders have the right to close the prabandham recital." But there is a contest between the parties as to the ritual to be observed at the closing ceremony known as Sathumurai. The Tengalais claim that their own Vazhi Tirunamam or benediction should alone be recited. The Vadagalais on the other hand claim the right to decite their own Vazhi Tirunamam, the last five verses of which differ from those of the Tengalai Vazhi Tirunamam, the rest of the verses being the same. The documentary evidence as to the practice in this matter is meagre and inconclusive and the conclusion reached in both Courts below is that no reason exists or case has been made out for excluding the Vadagalai Vazhi Tirunamam. If, as the High Court has held, contrary to the view of their Lordships, the Vadagalais are entitled at the opening of the service to recite their own manthram or invocation it would seem to follow almost as a matter of course that they should be entitled to recite their own Vazhi Tirunamam or benediction at its close. But if as the Subordinate Judge has held, and their Lordships also hold, the Tengalai manthram can alone be used at the opening of the service it would seem quiet inconsistent to hold the Vadagalais entitled to use their Vazhi Tirunamam at the conclusion of the service. Here it is instructive to have regard to the practice in other Tengalai temples. The same point came under consideration in the important case relating to the Tinnevelly temple to which reference has already been made (*Srinivasa Thathachariar* v. *Srinivasa Ayyangar*[1]). There it was expressly held that the Vadagalais should not be at liberty to interfere with the plaintiffs and other holders of the Adhyapakam office by repeating their Ramanuja Dayapathram or Vazhi Tirunamam either at the beginning or at the end of Sevakalam. Then again in the case of the temple at Conjeevaram, to which reference has also already been made (*Appadorai Ayyangar* v. *Annangaracharior*[2]), Mr. Justice Wadsworth after pointing out that in a previous suit (*Krishnasami Tatacharyar* v. *Krishnamacharyar*[3]) it had been held that the Vadagalais were not entitled to interfere with the Tengalais in the recital of the manthrams otherwise than as ordinary worshippers, observed that the judgment did not expressly cover the Vazhi Tirunamam to be used at the conclusion of the service. The learned Judge then addresses himself to this question. "It is recognised," he says, "that the Vazhi Tirunamam is the appropriate conclusion of the Adhyapakam service and that the stanza recited must be in honour of the saint invoked in the manthram which begins the service." He points out that the decree in the previous case in *Krishnasami Tatacharyar* v. *Krishnamacharyar*[3] "though it does not in so many words prescribe the singing of the Tengalai Vazhi Tirunamam by the

1. (1899) 9 M.L.J. 355.
2. (1939) 1 M.L.J. 124.
3. (1882) I.L.R. 5 Mad. 313.

mirasdars does very clearly prescribe the conduct of the whole Adhyapakam service right up to its termination by those mirasdars. It restrains the Vadagalais from singing their own sectarian hymns and chants or taking any part except by joining the Goshti as worshippers and reciting the Prabandhams recited by the mirasdars." He accordingly has "no doubt that the intention of the learned Judges was to authorise the mirasdars to append to the service its customary conclusion in the form approved by the sect to which they belonged, whose cult was to govern the service."

Their Lordships in the present case, being of opinion with the Subordinate Judge that the Tengalais are entitled to open the service with their own manthram alone and that the Vadagalais are not entitled to recite their manthram concurrently, are satisfied, in the absence of any sufficient evidence to the contrary, that the service must also be concluded by the recitation of the Tengalai Vazhi Tirunamam alone.

There remains the question of the recital of sthothrapatams. This matter is left in a very doubtful position on the evidence. The Subordinate Judge apparently found himself unable to reach any conclusion upon it and his formal decree makes no reference to it. The High Court in its decree finds in the sixth place "that plaintiff is entitled to use Tengalai Patram in the recitation of sthothrapatams whenever sthothrapatam is recited outside the temples but this does not exclude the use of Vadagalai Sthothrapatam Tanian Sriman Venkatanadharya." In the judgment of the High Court on the topic of the sthothrapatams the learned Judges state that they "can find no reliable evidence to support the positive case of either party." Nevertheless they proceed to consider the matter "in the light of the probabilities," and conclude by saying "We have already expressed our opinion under issue 8 that when Prabanda Sevakalam is once begun the Tengalais and the Vadagalais that take part in it carry on the service each reciting its own manthram. Judging the evidence in the light of the probabilities of the case we must come to the same conclusion with regard to sthothrapatams also on all occasions when these are sung by the goshti." By parity of reasoning their Lordships having taken a contrary view as to the use of the Vadagalai manthram, should "in the light of the probabilities" come to the opposite conclusion from the High Court as to the sthothrapatams. But they do not regard this as a legitimate method of disposing of the matter and accepting the view of the High Court that there is no reliable evidence to enable the custom of the sects to be ascertained they do not propose to make any finding on the subject.

As regards the conduct of processions inside and outside the temples in suit the appellant in his plaint claims that the Tengalai ritual should be exclusively observed both in the service inside the temples and in processions inside and outside the temples. The respondents did not submit any argument for differentiating in this matter between the case of the service inside the temples and the case of processions inside and outside the temples and their Lordships hold that their decision should extend to both cases alike.

Their Lordships also take note of the fact that the disallowance by the High Court of the appellant's claim relating to the recitations during the Anadhyayanam days was not the subject of any separate argument before them on the part of the appellant, but in the circumstances their Lordships think that the appropriate course is to make no order in the matter.

As regards the third head of the decree of the High Court which saves the rights of certain Vadagalai families to the Adhyapakam office, the appellant intimated that he did not challenge this finding.

The respondents did not withdraw their pleas that the suit was not cognisable in a Civil Court and that it was barred by limitation but it is enough to say that their Lordships agree with both Courts below that they are untenable.

Their Lordships will humbly advise His Majesty that the appeal be allowed and that the decree of the High Court of 18th March, 1937, be varied so as to read as follows :—

(1) That the plaintiff or any of his deputies Chinna Jiyyangar or any of the four Ekangis is exclusively entitled in the temples mentioned in Schedules A and B in the plaint and in processions both inside and outside the said temples to commence Prabandha Parayanam by saying Sadit Arula and to go on with the Tengalai patram to the exclusion of the Vadagalai patram.

(2) That the plaintiff is exclusively entitled to the headship of Adhyapakam miras.

(3) That the Vadagalais except the Dharmapuris, Kotikannikadanams and Thomalais (in Tirumalai) are not entitled to the Adhyapakam office in the plaint temples.

(4) That the plaintiff and the other Adhyapakam office holders have the right to close the prabandham recital.

(5) That only the Tengalai Vazhi Tirunamam can be repeated whenever Vazhi Tirunamam is recited.

(6) That respondents 6, 7, 10-14, 16, 20 and 21 as individuals and as representing the Vadagalai community residing at Tirumalai Tirupati and Tiruchanur are restrained by a perpetual injunction from interfering with the rights hereinbefore referred to of Pedda Jiyyangar or his deputies.

(7) That the rest of the plaintiff's claim (except so far as relating to the reciting of sthothrapatams and the recitations to be used on the Anadhyayanam days as to which no order is made) be and hereby is disallowed.

(8) That the parties shall each bear their own costs of the suit in the Court of the Subordinate Judge of Chittoor.

(9) That there be no costs in Appeal No. 119 of 1926 in the High Court.

(10) That the respondents 6, 7, 10-14, 16, 20 and 21 in the present Appeal do pay to the appellant his costs in the Appeal No. 466 of 1925 in the High Court and his costs of the present appeal.

Solicitors for Appellant : *Lambert and White.*

Solicitors for Respondents : *Harold Shephard and Chapman Walkers.*

H.J.U./V.S. ——— *Appeal allowed and decree varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

B. Venkitalakshmi Ammal .. *Petitioner**

v.

G. Chakrapani Ayyangar .. *Respondent.*

Provident Funds Act (XIX of 1925), section 3 (2)—Fund vesting in wife who is "dependant" as well as "nominee" under the Act—Exemption from attachment in execution of a decree obtained by a creditor against her.

The benefit under section 3 (2) of the Provident Funds Act from attachment in execution of a decree will be available when the sum is paid to any person who would be a dependant within the meaning of section 2 (*c*) of the Act whether such person becomes entitled to the sum by virtue of a nomination or by virtue of the general law or special rule as to dependants.

Accordingly a compulsory deposit in a railway provident fund standing to the credit of a depositor and payable to his wife under a nomination duly made by the depositor, is free from liability to be attached by a creditor in execution of a decree obtained against the wife for a debt incurred by her before the death of the depositor, though the wife is a "nominee," under section 5 (1) of the Act as well as a "dependant" within the meaning of section 2 (*c*).

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of Coimbatore, dated 2nd

* C. R. P. No. 774 of 1946. 19th December, 1946.

July, 1946, and made in C. M. A. No. 19 of 1945 (C. M. P. No. 133 of 1945, in O. S. No. 35 of 1945, D. M. C., Erode).

T. L. Venkatarama Aiyar and *G. R. Jagadisan* for Petitioner.

R. Gopalaswami Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition raises a question of some importance, namely, whether a compulsory deposit in a railway provident fund standing to the credit of a depositor and payable to his wife under a nomination duly made by the depositor, is free from liability to be attached by a creditor in execution of a decree obtained by him against the wife for a debt incurred by her before the death of the depositor. The facts are not in dispute. On 18th September, 1943, one Kondiah Naidu, an employee of the South Indian Railway, and his wife, the present petitioner, executed a promissory note in favour of the respondent for Rs. 1,700. Kondiah Naidu died on 20th November, 1944. On 23rd June, 1944, he had duly nominated his wife, the petitioner, as the person to whom the Provident Fund amount should be paid on his death. The respondent filed a suit O. S. No. 35 of 1945, in the Court of the District Munsiff, Erode, against the petitioner, on the promissory note, obtained a decree and proceeded to attach the Provident Fund amount in the hands of the Railway. An objection was raised on behalf of the petitioner that the amount was not liable to be attached under the provisions of section 3 (2) of the Provident Funds Act. The learned District Munsiff of Erode upheld the objection: but, on appeal, the learned District Judge of Coimbatore overruled it and issued an order of attachment. The judgment-debtor applies to this Court to revise the said order of the District Judge.

No decided case has been cited before me, which directly governs the facts of this case. The decision must therefore depend upon the construction of the relevant provisions of the statute with such help as may be derived from observations in decisions under the Act, though not directly in point.

Section 3 (2) of the Provident Funds Act is as follows:

"Any sum standing to the credit of any subscriber to, or depositor in, any such Fund at the time of his decease and payable under the rules of the Fund to any dependant of the subscriber or depositor, or to such person as may be authorised by law to receive payment on his behalf, shall, subject to any deduction authorised by this Act, and, save where the dependant is the widow or child of the subscriber or depositor, subject also to the rights of an assignee under an assignment made before the commencement of this Act, vest in the dependant, and shall, subject as aforesaid, be free from any debt or other liability incurred by the deceased or incurred by the dependant before the death of the subscriber or depositor."

Section 4 contains provisions regarding repayment of the sum standing to the credit of the subscriber or depositor. It is not necessary to extract the entire section. It provides that the sum shall be paid to the dependant if the sum vests in the dependant under the provisions of section 3, or, if the sum does not exceed Rs. 5,000 and if it is not payable to a dependant, then, it shall be paid to any person nominated to receive it, or, if any person is not nominated, to any person appearing to be otherwise entitled to receive it; and in case any sum or balance not payable to either a dependant or a nominee, as already mentioned, such sum shall be paid to a person nominated to receive it on the production of a probate or such other document, entitling him to receive payment, or, in the absence of a person nominated, to any person who produces such a document.

Section 5 (1) before it was amended by Act XI of 1946, was as follows:

"Subject to the provisions of this Act, but otherwise notwithstanding anything contained in any law for the time being in force or any disposition, whether testamentary or otherwise, by a subscriber to, or depositor in, a Government or Railway Provident Fund, of the sum standing to his credit in the Fund, or of any part thereof, any nomination, duly made in accordance with the rules of the Fund, which purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositor, shall be deemed to confer such right absolutely, until such nomination is varied by another nomination made in like manner or is expressly cancelled by the subscriber or depositor . . . . . ."

Obviously, a person nominated under section 5 (1) of the Act could also be a dependant as defined in section 2 (*c*) of the Act. In this case, the petitioner, in fact,

occupied the dual position of being both a nominee under section 5 and a dependant within the meaning of section 2 (*c*).

To ascertain whether the petitioner is entitled to the exemption laid down in section 3 (2), the condition to be fulfilled is that the sum standing to the credit of the depositor should be payable under the rules of the Fund to any dependant of the depositor. Such sum vests in the dependant and shall be free from any debt or other liability incurred by the deceased or incurred by the dependant before the death of the depositor. The contention on behalf of the petitioner is that though she is a nominee, she does not cease to be a dependant within the meaning of the Act. She will, therefore, be entitled to the freedom declared in the above provision. On the other hand, the contention for the respondent is that the exemption applies only when the sum is payable under the rules to a dependant as such, that is to say, not under a nomination, but in the absence of a nomination and in accordance with a specific provision in the rules.

For the respondent, it was said that the decisions of this Court in *Lakshmamma* v. *Subramanyam*[1] and *Sitaramaswami* v. *Venkatarama Rao*[2] support this contention in some way or other. In the first of these decisions, there was a dispute in respect of a Provident Fund amount between a person who claimed to be the widow of the deceased subscriber and who was also the person nominated by him as his successor to claim the amount and a son of the deceased subscriber, who opposed her claim on the ground that she was not the legally wedded wife of the depositor. The learned Judges held that the widow was entitled to the amount by virtue of the nomination in her favour. They point out that there is no restriction with regard to the persons, in whose favour the nomination can be made and nomination can also be made in favour of a person who is not a dependant. As it was not disputed that there was a valid nomination in favour of the person who claimed to be the widow, she would be entitled to the amount, whether she was in law his widow or not. In the second case, *Sitaramaswami* v. *Venkatarama Rao*[2], there was a nomination in favour of the first wife of a deceased depositor, but there was no subsequent variation of the nomination. It was held that the amount in deposit vested in the nominee and would be inherited by her son in exclusion of the other son of the depositor by his second wife. The learned Judges overruled the contention that section 5 applies only to nominees who are not dependants. It was pressed before them that unless section 5 were given restricted application, confined only to cases of nominees who are not dependants, that section could not be reconciled with section 3 or section 4. But the learned Judges observed that there was no inconsistency between sections 3, 4 and 5, even if a wide construction was given to section 5 so as to include all nominees whether they were dependants or not.

I fail to see how these two decisions can have any bearing on the question to be decided in this case. They only lay down that a person who has been nominated is entitled to receive the amount in deposit, whether he or she be a dependant or not.

I must confess that it is possible to take two views on the construction of the phrase :

"payable under the rules of the Fund to any dependant of the subscriber or depositor."

These words may mean, "payable under the rules to any dependant as dependant only," or, they may mean, "payable under the rules to a person who falls within the class of persons" defined in section 2 (*c*) of the Act. I have come to the conclusion that the better view to take is that the benefit of the exemption will be available when the sum is paid to any person who would be a dependant within the meaning of section 2 (*c*) of the Act, whether she becomes entitled to the sum by virtue of a nomination or by virtue of the general law or special rule.

The rules relating to the Provident Fund in question appear to have been available to the Courts below, though a copy of the rules has not been formally exhibited. Learned counsel before me agree that the summary of the relevant rules given in paragraph 4 of the learned District Judge's judgment is substantially

1. (1939) 1 M.L.J. 620. 2. (1944) 1 M.L.J. 198.

correct. Rule 27 is the most material rule. The learned District Judge gives a summary of it as follows :

"Rule 27 (a) mentions the mode of distribution ; it states by the saying in clause (a) that the distribution shall be according to section 4 (1) of the Provident Funds Act but subject to the provisions of the same rule 27 (b). Sub-clause (i) of clause (b) refers to some special contributions and it is not material in this case. Sub clause (ii) mentions that if a nomination made in accordance with rule 8 subsists, the amount shall be payable in accordance with such nomination, provided that if the nominee is not a dependant and the amount exceeds Rs. 5,000, it shall be paid only on production of probate, etc. Sub-clause (iii) mentions that if the nomination subsists or if the nomination relates only to a part of the amount, the whole or balance shall become payable to the members of his family in equal shares."

The learned District Judge points out that rule 3 (2) defines family so as to include, more or less, persons falling under the definition of dependant. This rule, to my mind, obviously recognises that the nomination can be in favour of a dependant and makes special provision to benefit a nominee who is also a dependant. If the nominee is not a dependant and the amount exceeds Rs. 5,000, it is payable to such nominee only to the production of a probate or such similar document. But if the amount is payable to a nominee who is a dependant, the rule does not require the production of a probate or like document or authority. It therefore follows that the rules not only recognise, as they ought to, the efficacy of a nomination, but also reveal that the identity of the nominee is not completely lost. If the nominee happens to be also a dependant, certain consequences follow. If therefore, under the rules, the amount is payable to a dependant as a nominee, then, I think it is not extravagant to hold that in that case the amount is payable, under the rules of the Fund, to a dependant of the subscriber or depositor.

Though ordinarily, it is not permissible for the Court to enquire into the intention of the Legislature,—and very often it is unsafe to rely upon a presumed intention of the Legislature, and, on that ground, to disregard the plain language of the enactment—nevertheless, there are occasions, when if there is a reasonable doubt as to the proper construction of the enactment in cases where two alternative constructions are possible, to adopt that construction which is more in consonance with the expressed policy underlying the Act, as can be gathered from the entire provisions of the Act itself. In *Caledonian Railway Company* v. *North British Railway Company*[1], Lord Selborne, L.C., observed as follows :

"The more literal construction ought not to prevail if....it is opposed to the intentions of the Legislature, as apparent by the statute ; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

Dealing with the provisions corresponding to the present section 3 (2) in the old Act, Rankin, J., observed as follows in *Hindley* v. *Joynarain Marwari*[2] :

"It is a further provision directed to a wholly different matter. It ensures that money payable to a widow or child as such directly shall not, even in their hands, be treated as assets of the deceased's estate. Nay more ; the Leigislature, knowing that this might be rendered ineffective by getting the widow or child to incur or to join in incurring the debt, provides (for the more complete discouragement of creditors) that such money, although in the hands of the widow or the child, shall not be made to answer for their own debts if incurred in the lifetime of the deceased. The only light thrown by the second sub-section upon the first is that the first did not go far enough."

Looking at the facts of the present case, the force of these observations is manifest. An acceptance of the construction sought to be put on the words in question by the respondent would lead to this anomalous result, that while a widow without a nomination in her favour would get the benefit of the freedom from liability to a debt incurred by her before the death of her husband, she would lose that right, because she is also entitled to the amount by virtue of a nomination in her favour. In my opinion, the words in section 3 (2) are flexible enough to permit the construction which I have decided to adopt.

In the result, the civil revision petition is allowed ; the order of the learned District Judge is set aside and that of the learned District Munsiff is restored.

The petitioner will be entitled to the costs of the civil revision petition and the costs in the lower Courts.

K.S. *Petition allowed.*

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1. (1881) 6 A.C. 114 at 122.
2. (1919) I.L.R. 46 Cal. 962 at 969.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Munia Servai .. *Petitioner**

v.

Thangayya Onturiyar and others .. *Respondents.*

Criminal Procedure Code (V of 1898), sections 145, 435 and 439—Revision against final order in proceedings under section 145, Criminal Procedure Code—Application for stay of delivery of possession to the respondents and for continuance of lands in possession of Receiver pending disposal of the revision petition—Maintainability.

During the course of an enquiry in proceedings under section 145, Criminal Procedure Code, the lands in dispute were put in the possession of the village Munsiff. In a criminal revision petition against the final order in such proceedings a petition was filed for the issue of an order directing the stay of delivery of possession of the lands to the respondents by the village Munsiff pending the disposal of the criminal revision petition by the High Court. On an objection as to the maintainability of such an application,

Held, that the application for stay of delivery of possession pending disposal of the criminal revision petition which virtually means the appointment of the village Munsiff as a Receiver after the termination of the proceedings under section 145, Criminal Procedure Code could not be maintained. The High Court cannot continue such a Receiver or appoint a new Receiver unless it is satisfied afresh that a dispute likely to cause a breach of the peace exists.

Marudayya Thevar v. *Shanmuga Sundara Thevar*, (1925) 49 M.L.J. 593, Followed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing stay of delivery of possession of the disputed lands to the respondents herein by the Agent appointed in the proceedings in the Court below (M. C. No. 14 of 1946 on the file of the Court of the Additional First Class Magistrate, Kumbakonam) pending disposal of Criminal Revision Case No. 57 of 1947, presented to the High Court to revise the order of the Court of the Additional First Class Magistrate of Kumbakonam dated 31st December, 1946, and made in the said M. C. No. 14 of 1946.

T. R. Venkatarama Sastri and *M. Srinivasagopalan* for Petitioner.

A. V. Viswanatha Sastri for Respondents.

The Court made the following

ORDER.—Mr. Viswanatha Sastri, learned advocate for the resoondents, raises an objection *in limine* against the admissibility of this application for stay of delivery of possession of the disputed lands to the respondents and for continuance of the lands in possession of the village Munsiff any further. His argument is that this Court has no jurisdiction to entertain such a petition, since the only provision of law upon which it could possibly be founded, *viz.*, section 561-A Criminal Procedure Code does not confer any new or additional powers on this Court and this Court has no inherent power to appoint a Receiver in proceedings that come up under section 145, Criminal Procedure Code in revision before it. For this position reliance is placed on the decision of a Bench of this Court in *Marudayya Thevar* v. *Shanmugha Sundara Thevar*[1]. There an application was made asking this Court to appoint a Receiver pending disposal of an application to revise an order passed by the Magistrate under section 145, Criminal Procedure Code. The learned Judges constituting the Bench held that the High Court has no jurisdiction to entertain such a petition pending disposal of a Criminal Revision Petition. A further contention was pressed before the Bench that this Court has all the powers that the Magistrate has got in the enquiry under section 145, Criminal Procedure Code. This contention was repelled with the following observations :

"Even assuming for the sake of argument that the High Court has that power, it would not in the least avail petitioner. For, in the first place, the Magistrate and therefore *ex hypothesi*, the High Court, can only appoint a Receiver while the enquiry is pending, and the enquiry is now over, and in the second place, the Magistrate, and therefore again the High Court, can appoint a Receiver only where it is satisfied that a dispute likely to cause a breach of peace exists, whereas now the Magistrate's order has put respondent in possession of the property and there is no danger of a breach of

* Crl. M. P. No. 67 of 1947. 24th January, 1947.

1. (1925) 49 M.L.J. 593.

the peace, unless the petitioner intends to defy the order of the Magistrate, and the High Court would certainly not encourage a party who announces his intention of doing so."

Mr. Venkatarama Sastri endeavoured to distinguish this ruling on the ground that the village Munsiff was appointed in this case by consent of both the parties; but that was when the case was pending enquiry. The reasoning in the portion of the Judgment extracted above still remains, as this is a case of continuing the Receiver appointed after the termination of the enquiry. This Court cannot continue such a Receiver or appoint a new Receiver unless it is satisfied afresh that a dispute likely to cause a breach of the peace exists.

Another point of distinction may perhaps be that, as it appears from the judgment in the Bench case, the respondent had been already put in possession of the property, whereas in the present case the village Munsiff still continues in possession thereof. The real position is that the respondents were deprived of possession on the 24th September, 1946, when the village Munsiff was appointed by the Court to take possession of the lands and to harvest the crops. Mr. Venkatarama Sastri concedes that if the Bench decision is applicable to the facts of the case, the preliminary objection has to prevail; but he endeavoured to distinguish it on the ground already stated.

I am of opinion that I am bound by the decision of the Bench, and I must, following it, hold that the application for stay of possession which virtually means the appointment of the village Munsiff as a Receiver cannot be maintained. The petition is dismissed.

In this view I have not gone further into the merits of the case and into the various questions involved, *viz.*, about the occupancy rights of the respondents, the nature of the regrant to the petitioner's vendor, *etc.*

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

N. Kandaswami Pillai and another .. *Petitioner*

v.

The Executive Officer, Panchayat Board, Attur (Salem Dt.) .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 242 and 403—Madras Local Boards Act (XIV of 1920), sections 194 and 207—Prior prosecution—Summons case—Withdrawal of complaint before questioning under section 242—Doctrine of autrefois acquit *applies—Erection of a factory if a continuing offence under section 207 of the Act.*

The petitioner was acquitted on a previous occasion of an offence under sections 194 and 207 of the Local Boards Act for having erected a factory without permission from the prescribed authority. He was subsequently prosecuted and convicted for running the factory. After that conviction a fresh charge sheet was filed against him for erection of the factory and the was prosecuted under the same sections, *viz.*, 194 and 207. On a plea that the fresh prosecution was barred by reason of the provisions of section 403 of the Code of Criminal Procedure,

Held, as under section 242 of the Code, the trial of a summons case begins when the accused appears or is brought before the Magistrate and not when he is asked to show cause why he should not be convicted, even though the executive officer withdrew the complaint on the prior occasion before the accused was questioned, the doctrine of *autrefois acquit* applied and was a bar to the fresh prosecution.

Held, further, that the erection of the factory was not a continuing offence under section 207 of the Act.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Stationary Sub-Magistrate, Attur, dated 31st August, 1946, in C. C. No. 1211 of 1946.

K. Kalyanasundaram for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Respondent not represented.

Cr. C. No. 1009 of 1946. 23rd January, 1947.
(Cr. R. P. No. 967 of 1946).

The Court made the following

ORDER.—The petitioner in this case was acquitted on a previous occasion of an offence under section 194 read with section 207 of the Madras Local Boards Act, 1920, for having erected a factory without permission from the prescribed authority. He was subsequently prosecuted for running the factory and convicted. After that conviction it would appear that a fresh charge sheet was filed against him for the erection of the factory and he was prosecuted under the same sections namely section 194 read with section 207 of the Act. When the case came up the plea was raised on behalf of the petitioner (accused) that a fresh prosecution did not lie in view of the previous acquittal, being barred by the doctrine of *autrefois acquit* under section 403 of the Code of Criminal Procedure. The Magistrate who dealt with the case overruled this objection and directed that the trial should proceed. The reason mentioned by him is that the executive officer withdrew the complaint on the previous occasion even before the question was put to him under section 242 of the Code of Criminal Procedure and therefore it cannot be held that the accused were tried and acquitted within the meaning of section 248 of the Code of Criminal Procedure. This view is clearly wrong. As set out in section 242 of the Code the trial of a summons case begins when the accused appears or is brought before the Magistrate, and not when he is asked to show cause why he should not be convicted. Before setting aside the order I wanted to be sure whether the erection of a factory is not a continuing offence and whether section 403 of the Code applies to a continuing offence. The language of section 207 of the Local Boards Act itself clearly shows that in order to constitute a continuing offence within the meaning of schedule IX of the Act, it is necessary that the person should have been first convicted of that offence and then continued to commit the same offence again. In the present case there has been no such original conviction and a continuance of the offence. Even otherwise the erection of a factory cannot be deemed to constitute a continuing offence because it is an act which can be performed only once although the running of the factory may constitute a continuing offence.

The petition is allowed and the order of the Magistrate is set aside and the proceedings before the Magistrate are quashed in view of the bar arising by reason of the previous acquittal.

V.P.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AIYAR.

K. R. Venkatarama Ayyar. .. *Appellant**

v.

Sri Varaguna Pandia Chinnathambiar Avergal, Zamindar of Sivagiri, a ward under the Court of Wards, Madras .. *Respondent.*

Limitation Act (IX of 1908), Articles 84, 113 and 115—Applicability—Claim for recovery of Advocate's fees—Suit in which advocate was engaged ending in compromise—Scope of Article 84—Claim after three years by advocate for his fees—Claim barred by limitation.

An advocate was engaged by an estate to defend a case against the owner of the estate, and a memo dated 18th November, 1935, mentioned the settlement of his fees. As money was not paid to the advocate, correspondence passed between the advocate and the party as a result of which, in 1937, the estate intimated paying up of arrears in the last week of April of that year. The suit had been compromised in 1936 itself. The estate then went under the management of the Court of Wards, and the advocate preferred a claim for his fees in 1941, which was held to be time-barred. In second appeal,

Held, that Article 84 of the Limitation Act was clearly applicable and the only question was as to the date from which the three years period commenced to run. It could not be said that as execution proceedings were still pending the suit had not terminated. Though the word "suit" may include execution proceedings as well as an appeal also, this meaning cannot be imported into Article 84 where the word "suit" seems to be used in its ordinary and not technical sense in which a layman

* S. A. No. 1726 of 1945. 6th December, 1948.

would understand it. Further, from the correspondence between the parties, there was no room for holding that the matter of the suit continued, for the purposes of the present claim, after the compromise in the suit. Hence the claim was barred by limitation. Neither Article 113 nor Article 115 had any application to such a claim.

Watkins v. *Fox*, (1895) I.L.R. 22 Cal. 943 and *Balakrishna Pandurang* v. *Govind Shivaji*, (1883) I.L.R. 7 Bom. 518, relied on. *Hearn* v. *Bapu Saju Naikin*, (1876) I.L.R. 1 Bom. 505, *Sadashiv Ganpatrao* v. *Vithaldas Nanchand*, (1895) I.L.R. 20 Bom. 198 and *Gulam Mohideen Sahib* v. *Md. Oomer Sahib*, (1930) 60 M.L.J. 133, explained and distinguished.

Appeal against the decree of the District Court of Tinnevelly dated 14th July, 1945, and passed in A. S. No. 95 of 1945, preferred to the said Court against the decree of the Court of the Subordinate Judge of Tinnevelly passed in O. P. No. 13 of 1944.

K. S. Sankara Aiyar and *V. Sundaresan* for Appellant.

A. Swaminatha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—Mr. K. R. Venkatarama Ayyar, a leading advocate of Madura, was engaged by the Zamindar of Sivagiri to defend O. S. No. 3 of 1928, on the file of the Sub-Court, Tinnevelly, in which the Zamindar was the defendant. Ex. P.3 is a memo regarding settlement of fees at Rs. 2,800 and it is dated 18th November, 1935. This sum was made up in the following manner :—Rs. 500 was balance due up to that date, Rs. 800 was the balance due in respect of a fee of Rs. 1,500 settled for filing a legal representative petition and Rs. 1,500 was the amount then settled for conducting the case from that day till its final disposal, inclusive of the fees for commission enquiry, if any, which may be held at Madras. When the advocate claimed Rs. 3,222 as due to him, a reply was sent to him by the Dewan (Exhibit D-1) on 9th September, 1936, pointing out that that only Rs. 2,000 was due. The advocate wrote to the Dewan Exhibit D-2 on 13th September, 1936, that he had heard from the junior vakil that a compromise had been effected in the suit and that a compromise memo was going to be filed in Court and the fact that he was not consulted about it was of no concern to him, so long as the amount due to him was paid. So he asked for a telegraphic remittance of Rs. 2,100. Exhibit P-4 is a letter from the Dewan dated 30th March, 1937, intimating to the advocate that the Zamindar promised to pay up the arrears in the last week of April.

When the estate went under the management of the Court of Wards, the advocate preferred a claim before the Collector of Tinnevelly on 25th June, 1941, for Rs. 2,100+Rs. 222+Rs. 272+Rs. 254 and interest. The Collector referred to the Subordinate Judge, Tinnevelly the question whether the claim for Rs. 2,000 was in time and not barred by limitation. In making the reference he expressed the opinion that the claim was barred. The Subordinate Judge upheld the Collector's view. On appeal by the advocate, the Subordinate Judge's decision was confirmed. This second appeal has been preferred by the advocate and the only question is whether the claim for Rs. 2,000 fees due to the advocate is within time.

Reluctantly do I feel compelled to uphold the view taken by the lower Courts ; I say reluctantly because I may confess frankly that I do not expect institutions like the Court of Wards to raise pleas of limitation in bar of suits filed for recovery of fees due to advocates who appear for the estate or estates in their charge. This however has nothing to do with the decision of the question of law involved in the case. Article 113 has nothing to do with the question. A suit for the recovery of money due for work done cannot be regarded as a suit for specific performance of a contract. For the same reason, Article 115 has no application as there is nothing like compensation for the breach of any contract. Before we go to Article 120 we must see whether there is not any other Article which will apply. Article 84 is clearly applicable and the only question is, what is the date from which the three years period commences to run. It was urged for the appellant that as execution proceedings in the suit are still pending the suit cannot be said to have terminated. For certain purposes no doubt the word "suit" may include execution proceedings, as well as an appeal also. But this meaning cannot be imported into Article 84 where the word "suit" seems to be used in its ordinary non-technical sense in which a layman would understand it. Moreover, under section 2 of the

Act, "suit" does not include an appeal or an application. *Hearn* v. *Bapu Saju Naikin*[1], *Sadashiv Ganpatrao* v. *Vithaldas Nanchand*[2] and *Gulam Mohideen Sahib* v. *Md. Oomer Sahib*[3] were cited for the appellant; but they seem to have no bearing. In the first case, it was held that the suit did not terminate by a compromise which was entered into between the parties without the knowledge of the solicitor and which was not made through, or certified to the Court which passed the decree. There was no discontinuance by the attorneys of the business which they were conducting for the defendant, nor had that business terminated. In the second case, there was no question of limitation at all involved; the point for consideration was whether a vakalatnama continued in force till all proceedings in the suit were ended so far as regards the client and it was held that it was in force. The third case merely lays down that the business for which the attorney was engaged did not terminate in 1924 as was contended in support of a plea that the claim was barred under Article 84. On the other hand, the decision is against the appellant as it was pointed out that Article 84 is restricted to suits. What Venkatasubba Rao, J., held was that even assuming that applications are governed by way of analogy, there was no bar.

On the other hand, *Balakrishna Pandurang* v. *Govind Shivaji*[4], is directly in point and is against the appellant. It was there contended for the plaintiff that the termination of a suit means not the result or the decision but the final and entire satisfaction by execution or otherwise of the decree given. This contention was negatived by West, J., who quotes in support of his view the observation of Blackburn J., in *Harris* v. *Quine*[5].

> "The termination of a suit is when judgment is given in the Court in which the action is commenced."

To the same effect is the decision reported in *Watkins* v. *Fox*[6], which contains a footnote referring to another decision by Trevelyan, J., who deals with a similar plea as is now put forward on behalf of the appellant in the following words:

> "It was contended that, for the purpose of the Limitation Act, the suit had not terminated as the attorney might have to appear in the execution proceedings. This contention, if correct, would postpone the attorney's remedy for twelve years.
>
> In my opinion a suit can ordinarily be said to have terminated, when there is nothing more to be done in it, except execution."

On the facts, there is little scope for holding that the engagement of the advocate was to cover the execution proceedings also. It is seen from the memo Exhibit P-3 that he was stipulating for separate fees for separate proceedings in the suit like legal representative petition, commission enquiry at Madras etc., and his own letter Ex. D-2 gives the clearest indication that he deemed his engagement at an end as soon as the compromise had been put through without reference to him. The advocate himself did not put forward any such comprehensive interpretation on his engagement. There is another difficulty also in his way. If execution proceedings were also in the contemplation of the parties, then the claim for the fee is obviously premature.

The second appeal is dismissed with costs.

No leave.

K.C. *Appeal dismissed.*

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1. (1876) I.L.R. 1 Bom. 505.
2. (1895) I.L.R. 20 Bom. 198.
3. (1930) 60 M.L.J. 133.
4. (1883) I.L.R. 7 Bom. 518.
5. (1869) L.R. 4 Q.B. 653 at 658.
6. (1895) I.L.R. 22 Cal. 943.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

S. M. Ar. M. Arunachalam Chettiar *alias* Veerappa Chettiar .. *Petitioner**

v.

M. S. T. Thanneermalayan Chettiar .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 353-A—Sanction under—Necessity for—Test to decide—Abuse of one member of a Municipal Council by another member during the course of a meeting of the Council and threatening to assault him—Continuing the threatening after the dissolution of the meeting—Sanction, if necessary.

The correct test applicable to decide whether sanction under section 353-A of the Madras District Municipalities Act is necessary is to see whether the act complained of was done while acting or purporting to act in the discharge of official duty and whether the said act can reasonably be related to the official character of the person who did the act or in other words there was anything in the nature of the act complained of that attaches it to the official character of the person doing it.

During the course of the meeting of a Municipal Council, one of the members abused another member and challenged him to a fight and threatened to assault him. The threat was continued even after the termination of the meeting. On a question as to whether sanction under section 353-A of the District Municipalities Act was necessary for the cognizance of the offences in respect of those acts,

Held, in the circumstances, the abuse and the throwing out of the challenge and its acceptance, was done while acting or purporting to act in the discharge of official duty and sanction under section 353-A would be required for the cognizance of any offence in respect of that. The further acts amounting to offences committed thereafter cannot be said to be done while acting or purporting to act in the discharge of official duty as they did not in any manner whatsoever relate to the official character of the person at that time and hence would not require sanction under section 353-A of the Act.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Session, Ramnad division at Madura, dated 15th April, 1946, and made in Crl. R. C. No. 8 of 1946 (C. C. No. 1 of 1946, Additional Sub-Magistrate's Court, Tiruppattur).

L. S. Veeraraghava Aiyar for Petitioner.

G. N. Chary for Complainant.

C. Balasubramaniam for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—On 2nd January, 1946, the respondent, who is a member of the Municipal Council, Karaikudi filed a complaint before the Additional Sub-Magistrate, Tiruppattur against the petitioner who is another member of the Council complaining of certain offences committed by the petitioner during and after a meeting of the Municipal Council held on the evening of the 27th December, 1945. At that meeting a resolution was moved with reference to the improvements to be effected to a market in Karaikudi. The petitioner and the respondent expressed opposite views on the resolution and when the sense of the house was taken six members voted for the complainant's view while four were against it. One other councillor remained neutral. The chairman started recording the result of the poll and in doing so he noted first the fact of one of the Councillors remaining neutral and thereafter the result of the division with regard to the resolution. The petitioner (accused) objected to this method of recording the minutes and said that the division should be noted first and thereafter the neutral vote. He suggested that what had been already recorded should be scored out from the minutes book. According to the complaint, the complainant also supported this suggestion but the accused was not pleased with the complainant's support since he felt chargrined by the defeat his resolution had suffered. An altercation ensued between the petitioner and the respondent and in the course of the altercation the petitioner is said to have abused the respondent and threatened to knock out his teeth. The respondent accepted the challenge and asked him to try. This is the first stage of the incident. When

* Cr. R. C. No. 532 of 1946. 16th January, 1947.
(Cr. R. P. No. 511 of 1946).

the challenge was so accepted the petitioner is said to have left his seat and proceeded to the place where the respondent was sitting and called him out so that he may knock out his teeth and show him what he could do. He scratched the complainant's right hand, pulled the right lappel of his coat and tore it. One of the councillors intervened and separated them. Immediately the petitioner is said to have taken up his shoe and rushed towards the respondent to strike him. Again some of the councillors intervened and separated them. At that stage the meeting was adjourned. This may be regarded as the second stage of the incident. After the adjournment of the meeting the petitioner went out of the meeting hall and stood in the outside verandah and threw out a challenge in abusive language to the respondent to come out of the hall, saying that he was prepared to shoe him and even go to prison. When he said this he had his shoe in his hand and was brandishing it. The petitioner was, according to the complainant, caught hold of, and pushed and taken away from the place.

Upon these averments a complaint was filed alleging the commission by the petitioner of offences under sections 323, 352, 355 and 504 of the Indian Penal Code. The Additional Sub-Magistrate dropped further proceedings with regard to the complaint and discharged the accused, taking the view that under section 353-A of the District Municipalities Act sanction of the Provincial Government was necessary to enable the Court to take cognizance of these offences in view of the circumstances that all the acts complained of were done by the accused while acting or purporting to act in the discharge of his duties as a Municipal Councillor. An application to revise that order was made before the Sessions Judge of Ramnad, who, however, took a different view and held that sanction of the Provincial Government was not required for the prosecution of the petitioner and set aside the order of the Sub-Magistrate and directed enquiry into the complaint. The present application by the accused in that case is to revise the order of the Sessions Judge.

Section 353-A of the District Municipalities Act provides:

> "When the chairman, any councillor or the executive authority is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Provincial Government."

It will be noticed that the corresponding section 227-A of the Madras Local Boards Act is in identical language. Section 197 of the Code of Criminal Procedure which also requires the sanction of the Provincial Government in certain cases contains the phrase "while acting or purporting to act in the discharge of his official duty" which occurs in the two Acts referred to above. Section 270 (1) of the Government of India Act has also been referred to and there the consent of the Governor of the Province is required in the case of a person employed in connection with the affairs of the Province with regard to any act done or purporting to be done in the execution of his official duty as a servant of the Crown. Literally speaking, section 270 of the Government of India Act is not concerned with acts or things done "while acting or purporting to act in the discharge of his official duty" but with acts done or purporting to be done in the execution of a duty as a servant of the Crown. A distinction has been drawn between the language of this section, and section 197 of the Code of Criminal Procedure by Varadachariar, J., in *Dr. Hori Ram Singh* v. *The Crown*[1], where the learned Judge at page 43, points out that section 197 of the Code of Criminal Procedure cannot be treated as bearing a true analogy to section 270 (1) of the Constitution Act. It is unnecessary to go into that aspect of the matter although I may while on this decision of the Federal Court usefully advert to the test that Varadachariar, J., laid down with reference to section 197 of the Code of Criminal Procedure, as the correct test applicable to a case arising under that section. After examining the various decisions bearing upon the question the learned Judge pointed out that there are three groups of cases which have laid down three different tests. In the first group it is insisted that there must be something in the nature of the act complained of that attaches it to the official character

1. (1939) 2 M.L.J. (Supp.) 23 at 43 : 2 F.L.J. 153 (F.C.).

of the person doing it. In the second group more stress is laid on the circumstance that the official character or status of the accused gave him the opportunity to commit the offence, in the third group of cases, stress is laid almost exclusively on the fact that it was *at a time* when the accused was engaged in his official duty that the alleged offence was said to have been committed. Varadachariar, J., was of the opinion that the first was the correct test; and referring to the time test, namely, that mentioned in the third group of cases the learned Judge said :

"The use of the expression 'while acting, etc.' in section 197 of the Criminal Procedure Code (particularly its introduction by way of amendment in 1923) has been held to lend some support to this view. While I do not wish to ignore the significance of the time factor, it does not seem to me right to make it the test. To take an illustration suggested in the course of the argument, if a medical officer, while on duty in the hospital, is alleged to have committed rape on one of the patients or to have stolen a jewel from the patient's person, it is difficult to believe that it was the intention of the Legislature that he could not be prosecuted for such offences except with the previous sanction of the Local Government."

There seems to be no reported case decided directly under section 353-A of the District Municipalities Act; at any rate none has been cited before me. On behalf of the petitioner my attention has been drawn however to some decisions of this Court given under section 227-A of the Local Boards Act and section 197 of the Code of Criminal Procedure. I must first advert to the Bench decision reported in *Gangaraju* v. *Venki*[1], which was a case under section 197 of the Code of Criminal Procedure. It was held in that case that the question in such cases is not as to the nature of the offence but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official duty. Any discussion, therefore, as to the nature of the offence is of remote relevance on the question whether sanction is necessary under any of these special protective provisions. The test laid down by Waller, J., in the Bench decision cited above is whether it was committed by a public functionary acting or purporting to act as such in the discharge of his official duty. The three other decisions, all decided by Pandrang Row, J., bearing upon this question are *Karuppiah Thevan* v. *Krishna Pillai*[2], *Subbiah* v. *Ramacharlu*[3] and In re *Subramania Mudaliar*[4]. In all these cases the learned Judge took the view that the act need not be an authorised or official act, the reasoning being that if it was an authorised or official act, it would not be an offence. The protection is given only with reference to acts which transgress the limits of one's official competence. But in *Karuppiah Thevan* v. *Krishna Pillai*[2], the learned Judge took care to point out that the question for decision was not whether the particular act alleged was within the jurisdiction or competence of the Board but whether the act was done while the accused purported to act in discharge of his duties and whether the act can be reasonably related to the official character of the person who did it. By laying down this test, namely, that the act should be reasonably related to the official character of the person who did it, the learned Judge was virtually adopting the criterion laid down by Varadachariar, J., in *Dr. Hori Ram Singh* v. *The Crown*[5], namely, that there should be something in the nature of the act complained of that attaches it to the official character of the person doing it. It is not necessary to refer to the other cases cited as they do not carry the discussion further.

On a scrutiny of all the decisions bearing upon the point the correct test to be applicable would in my opinion be whether the act complained of was done while acting or purporting to act in the discharge of official duty and whether the said act can reasonably be related to the official character of the person who did the act or in other words there was anything in the nature of the act complained of that attaches it to the official character of the person doing it.

Applying this criterion to the present case there can be little doubt that the first stage ending with the throwing of the challenge and the acceptance of the challenge was done while acting or purporting to act in the discharge of official duty. The precise language employed by the offending councillor may not be

1. (1929) 57 M.L.J. 31 : I.L.R. 52 Mad. 602.
2. (1939) 1 M.L.J. 444.
3. (1939) 2 M.L.J. 117.
4. A.I.R. 1940 Mad. 297.
5. (1939) 2 M.L.J. (Supp.) 23 : 2 F.L.J. 153 (F.C.).

justified as "Parliamentary" but it was allegedly uttered while exercising his right of objecting to his colleague intruding when he was making his protest to the chair about the method adopted at recording the proceedings in the minute book. If therefore any offence is alleged to have been committed at that stage, sanction would be required under section 353-A of the District Municipalities Act. With reference to acts said to have been committed during the second and third stages, there can be no doubt that they were not done while acting or purporting to act in the discharge of official duty as they did not in any manner whatsoever relate to the official character of the person at that time. Any offence committed during those stages therefore does not require the previous sanction of the Provincial Government under section 353-A of the District Municipalities Act.

The order of the Sessions Judge is accordingly modified and the Stationary Sub-Magistrate of Tiruppattur is directed to proceed with the case according to law in the light of the observations made in this judgment.

V.S. — *Order: modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

The Public Prosecutor .. *Appellant**

v.

V. S. Viswanathan and another .. *Respondents.*

Indian Penal Code (XLV of 1860), sections 116 *and* 160—*Offer of bribe to a public servant after he had become* functus officio *in a particular matter—Whether an offence of abetment of taking a bribe.*

Where the Textile Officer had considered an application presented by the accused for grant of permit for extra supply of yarn and had come to the conclusion that there was no case on the merits and had decided not to give additional yarn, but on the next day the accused appeared before him and repeated his request for the permit along with the offer of a bribe,

Held, that the offering of bribe is *per se* no offence under section 160 of the Indian Penal Code. The accused were sought to be implicated with the aid of section 116 of the Indian Penal Code as abettors. In the circumstances, it cannot be said that the act of the accused would amount to abetment of taking the bribe, under the existing law.

Venkatarama Naidu, In re, (1929) 57 M.L.J. 239, followed.

Appeals under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid first respondent (accused 1) by the Sessions Judge of Madura in E. A. No. 130 of 1946 on his file and of the aforesaid second respondent (accused 2) by the City First Class Magistrate, Madura, in C. C. No. 167 of 1946 on his file.

The appellant in person.

The Court delivered the following

JUDGMENT.—The appellate Magistrate who acquitted the respondents in these two appeals filed by the Public Prosecutor of the alleged offence of abetment of bribery came to the conclusion in view of certain admissions made by the Textile Officer P. W. 1, that the decision in *Venkatarama Naidu*, In re[1], applied to the facts of this case. P. W. 1 stated that he had considered the application presented by the respondents for the grant of a permit for extra supply of yarn on its merits and had come to the conclusion that it had no merits. He had decided not to give additional yarn and apparently conveyed his decision to the concerned parties. The next day, the respondent in C. A. No. 35 of 1947, alone appeared before P. W. 1, and repeated his request for the permit and offered a bribe of Rs. 300. P. W. 1, the concerned officer, stated further that once he had rejected the application for special quota, he had never granted it on repeated applications. In view of these clear statements of the Textile Officer, the Bench decision referred to above directly applies. There, Coutts-Trotter, C.J., observed :

* Crl. Appeals Nos. 35 and 36 of 1947. 17th January, 1947.

1. (1929) 57 M.L.J. 239.

"If a man, in the vain hope of getting a public officer to reconsider a question as to which that public officer is *functus officio* offers a bribe, he commits no offence by doing so and presumably the public officer would commit no offence by taking it."

The learned Judge, Pakenham Walsh, J., agreed with this view. The appellate Magistrate was clearly right in feeling bound to follow the Bench decision of this Court. Offering a bribe is *per se* no offence under section 160 of the Indian Penal Code; the respondents are sought to be implicated with the aid of section 116 of the Indian Penal Code as abettors; in the circumstances of cases like this, it is difficult to conceive how such an act can, under the present law, amount to abetment of taking the bribe.

The learned Public Prosecutor contends that the case in *Venkatarama Naidu*, In re[1], was wrongly decided and requires reconsideration. The decision has stood all these years without any dissent. The more effective remedy would be, as proposed by the learned Chief Justice in that case, to bring comprehensive legislation with a view to render the giver of the bribe also substantively punishable and to extend its scope to other departments of national life on the lines of Fry's Act in England.

The appeals are dismissed.

K.C. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA AND MR. JUSTICE RAJAMANNAR.

R. M. L. Natarajan Chettiar (deceased) and another .. *Appellants**

v.

A. L. A. R. Rm. Vellayyan Chettiar (deceased) and others .. *Respondents.*

Madras Estates Land Act (I of 1908), sections 3 (16) (a), 20 and 21—Tank and tank bund—Tank intended exclusively for the villagers to take drinking water from—User by plaintiffs and members of their family for a different purpose—Claim of title—Sustainability.

The subject-matter of a suit to set aside an order of the Collector under sections 20 and 21 of the Madras Estates Land Act was an oranai or tank, the tank bund and the land all round the tank and there was no reliable evidence oral or documentary in proof of the plaintiffs' contention that the tank was constructed by an ancestor of theirs. But, as a matter of fact, no such contention was put forward in an earlier litigation and all that some documents showed was, that they were 'hukdars' of the tank, that is, persons in management. The villagers had at all times been using this tank for taking water for drinking purposes.

Held, that the land in question answered the description contained in section 3 (16) (a) of the Madras Estates Land Act and the plaintiffs who had allowed shops and sheds to be erected on the tank bund and thus used it for a purpose different from that for which it was intended, were liable to be evicted by the Collector under section 21 of the Madras Estates Land Act.

Appeal against the decree of the Court of the Subordinate Judge of Devakottah in O. S. No. 19 of 1940.

N. Sivaramakrishna Aiyar for Appellants.

K. Parasurama Aiyar for Respondents.

The Judgment of the Court was delivered by

Somayya, J.—This is an appeal filed by the second defendant against the decree of the lower Court dismissing the suit which was one to set aside an order passed by the Collector under sections 20 and 21 of the Madras Estates Land Act. The subject-matter of the suit is an oranai or a tank which is now admitted to be intended exclusively for the villagers to take drinking water from. In the plaint it was alleged that the oranai or the tank, the bund and the land all round the oranai were the private and absolute properties of the plaintiffs and of defendants 2 and 3.

A petition was filed in 1937 before the Collector for action under sections 20 (1) and 21. Under section 20 (1) the Collector is empowered on the application of the landholder or other person interested, to decide any question as to whether any land is or is not of the description mentioned in sub-clauses (*a*), (*b*) or (*c*) of clause (16) of section 3. Section 3, clause (16) defines ryoti land to mean cultivable land

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1. (1929) 57 M.L.J. 239.

* Appeal No. 123 of 1942. 17th July, 1946.

in an estate other than private land and it does not include (*a*) beds and bunds of tank and of supply, drainage surplus or irrigation channels. We are not concerned with (*b*) and (*c*) of clause (16), section 3. If a particular land in an estate is a tank, then it comes under clause (16) (*a*), so do the bed, and the bunds of the tank. Section 20 (1) also empowers the Collector "to decide any question as to the customary rights in the user of any land which is of any such description, as existing at the commencement of this Act." Under this part of section 20 (1) the Collector is empowered to decide as to the customary rights in the user of the tank and the tank bund. Under section 21 any person occupying any of the lands mentioned in sub-clauses (*a*) and (*b*) of clause (16) of section 3 for any purpose other than that for which they are so set apart can be evicted by the Collector in the manner provided by the Madras Land Encroachment Act, if such user commenced not more than thirty years before the date of the suit. In the present case the complaint before the Collector was that contrary to the purpose for which the tank was set apart, the appellant and the members of his family allowed several persons to construct shops and sheds. It was alleged that the erection of these shops and sheds rendered the tank water unfit for drinking purposes. The Collector agreed with these contentions after an elaborate enquiry and held that the land in question answered the description in section 3, clause (16) (*a*) that the villagers were entitled to use the tank exclusively for taking water for drinking purposes, that the tank cannot be put to any other use, that the plaintiffs were not the owners of the tank, and that on the other hand the tank was one set apart for the common use of all the villagers. Under section 21 he found that the tank bund was being used for purposes other than that for which it was set apart. In the result he passed an order for evicting the persons who had erected shops and sheds and also directed eviction of the appellant and the members of his family, that is, the plaintiffs and defendants 2 and 3 in the lower Court. The second defendant who is one of the members of the plaintiffs' family has preferred this appeal. He is entitled to prefer the appeal, being a person having a common interest with the plaintiffs in the action.

Dealing with the merits of the appeal we are of opinion that there is no substance in the claim that the property in question is the private and absolute property of the appellant and his family. The plaint started with saying that the tank was constructed by an ancestor of theirs called Karuthan. As the lower Court has pointed out, there is no reliable evidence, oral or documentary, in proof of this contention. No doubt it is not possible to expect direct evidence; but the lower Court has given sufficient reasons to come to the conclusion which it did. In particular we may refer to one point made by the lower Court that in an earlier litigation of 1916, the then members of the plaintiffs' family never even stated that the tank itself was constructed by an ancestor of theirs. No reference was made to Karuthan who is said to have been the ancestor and the person who constructed the tank. All that we have in this case is that from 1902 or thereabouts, the authorities and, in one or two instances, the members of the contesting defendants' family, treated members of the plaintiffs' family as the hukdars or the trustees of the tank. The expression "hukdars" used in some of the documents does not seem to indicate anything more than mere persons who were in management of the affairs of the tank. It is unnecessary to refer to the various documents in detail because the effect of it is well summarised in the judgment of the lower Court, and it has not been suggested to us that there is any document in which the plaintiffs are referred to as the owners of the tank or in which the tank was referred to as the private property of the plaintiffs. That the villagers have been using this tank for taking water for drinking purposes is not challenged before us an it cannot be challenged on the evidence as it stands. We agree with the lower Court that the land in question is a tank and tank bund set apart for the common use of the villagers and that it answers the description contained in section 3, clause (16) (*a*) of the Madras Estates Land Act.

As pointed out by the lower Court, it is clear that the erection of the shops and sheds must necessarily affect the quality of the water in the tank and there is

no doubt therefore that the erection of these buildings amounts to putting the land to a purpose other than that for which it was intended. We may also remark that the lessees of the shops and sheds against whom t ere was an order of eviction made by the Collector have not been even made parties to the present suit and they have not chosen to challenge the correctness of the order made by the Collector. It is only the plaintiffs and defendants 2 and 3 that challenged the correctness of the lower Court and their main ground is that the property is their absolute property. That claim is found against and on the finding that the user for the last 15 years or so is contrary to the purpose for which it was intended, the order of eviction upheld by the lower Court against the plaintiffs and defendants 2 and 3 must also stand. If the plaintiffs had honestly come forward with the case that they were trustees of this oranai, then things might have been possibly different, but as it is, we are unable to do anything more than maintain the decree of the lower Court.

The appeal fails and is dismissed with costs.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Perumal and others .. *Petitioners**

v.

Perumal Reddiar and another .. *Respondents.*

Provincial Small Cause Courts Act (*IX of* 1887), *Schedule II, Article* 35 (ii)—*Applicability—Suit to recover sum representing value of tamarind belonging to plaintiff alleged to have been taken away by the defendants —Not excepted from the cognizance of Small Cause Courts—Likelihood of question of title to immoveable property being gone into—If affects jurisdiction of the Small Cause Court.*

Where a suit is for the recovery of a sum of Rs. 65 being the value of tamarind belonging to the plaintiff alleged to have been taken away by the defendants, it does not fall within Article 35 (*ii*) of Schedule II of the Provincial Small Cause Courts Act for it cannot be said that the averment in the plaint discloses the commission of a criminal offence by the defendants. Nor does the suit relate to a right to immoveable property because after the tamarind is brought down from the trees, it is certainly moveable property. The fact that incidentally the question of title to immoveable property may have to be gone into does not take away the jurisdiction of the Small Cause Court.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of th District Munsiff of Turiyur dated 14th November, 1945, and passed in S. C. S. No. 118 of 1945.

K. V. Rangachari for Petitioners.

A. Seshachari for Respondents.

The Court delivered the following

JUDGMENT.—The only question which arises for decision in this civil revision petition is whether the suit is excepted from the cognizance of the Small Cause Courts because the claim falls under Article 35 (*ii*), Schedule II of the Act which runs as follows :

"A suit for compensation for an act which is, or, save for the provisions of Chapter IV of the Indian Penal Code, would be, an offence punishable under Chapter XVII of the said Code."

The suit was for the recovery of a sum of Rs. 65 being the value of tamarind belonging to the plaintiff alleged to have been taken away by the defendants on 1st March, 1945. The learned District Munsiff of Turiyur held that the suit did not fall within the scope of this Article and decreed the suit finding on the merits in favour of the plaintiff. The defendants are the petitioners in this Court.

Though a number of decisions were cited before me by both the learned advocates for the petitioners and respondents, in every decision the learned Judges make it clear that whether a suit does or does not fall within the Articles is *prima*

* C. R. P. No. 282 of 1946. 10th December, 1946.

facie a matter to be decided upon the language of the plaint. See the decisions in *Sakhya* v. *Sadashiv*[1], *Bhan Dat* v. *Moti Lal*[2] and *Deoki Rai* v. *Harakh Narain Lal*[3]. I have been taken through the plaint and on a fair and ordinary consideration of the plaint it appears to me that the present suit does not fall within that Article. I cannot say that on a fair reading of the plaint it discloses the commission of criminal offence by the defendants. The material paragraph is the fourth in which it is alleged that on 1st March, 1945, the plaintiff gathered the tamarind from certain trees and tried to collect the same, but the defendants joined together and unlawfully took away the tamarind thus causing loss to the plaintiff. The learned advocate for the petitioners wants me to hold on this language that the plaintiff alleges the commission of theft by the defendants, as if the plaintiff had said that the defendants with the dishonest intention of causing unlawful gain to themselves and loss to the plaintiff took away the tamarind. On the other hand, what I find in the plaint is that the defendants took away the tamarind and thus caused loss to the plaintiff. The language in some of the cases cited on behalf of the petitioners, is not identical with the language used in the plaint in this case. I agree with the learned District Munsiff that the case does not fall within Article 35 (*ii*) of Schedule II of the Provincial Small Cause Courts Act.

It was also contended by the petitioners' counsel that the suit relates to a right to immoveable property because while the plaintiff alleges that the trees belong to certain temples, the defendants claim that they are situated on their own land. He, however, conceded that when trees were cut they became moveable property and a suit in respect of such trees when cut would be cognizable by a Court of Small Causes. I do not find any distinction on principle between trees which have been cut and produce which has been gathered from the tree. After the tamarind has been brought down from the tree, as alleged by the plaintiff, it is certainly moveable property. The fact that incidentally the question of title to immoveable property may have to be gone into does not take away the jurisdiction of the Small Cause Court. I do not agree with the contention of the petitioners.

In the result, the Civil Revision Petition is dismissed with costs.

V.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

G. V. Krishnamurthi Ayyar .. *Petitioner**

v.

R. Kailasam Ayyar and another .. *Respondents.*

Hindu Law—Joint family—Suit by endorsee of promissory note executed by father—Decree against undivided sons of executant—Judgment-debtors directed to pay the decree amount "as the legal representatives of their late father"—Executability against the joint family property in the hands of the judgment-debtors—Civil Procedure Code (*V of* 1908), *section* 115—*Executing Court going behind the decree under a mistake of law—Interference in revision.*

In a suit by the endorsee of promissory note executed by the father of a joint Hindu family, a decree was passed against the undivided sons of the executant and the judgment-debtors were directed to pay the decree amount "as the legal representatives of their late father." The decree-holder proceeded to attach the joint family properties in the hands of the judgment-debtors. On an objection that such properties cannot be proceeded against in execution of the decree,

Held, that the joint family properties in the hands of the judgment-debtors would be liable to be proceeded against in respect of a decree passed for the payment of the debt by the maker of the note, their father. The fact that the suit was by an endorsee of the note did not affect the question as the decree was on the debt of the father.

Held, further, that where the executing Court refuses execution against the joint family properties in such circumstances, it acts without jurisdiction, because by a wrong understanding of the law it goes behind the decree and therefore clearly furnishes a ground of interference contemplated by section 115, Civil Procedure Code.

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1. A.I.R. 1930 Bom. 361.
2. A.I.R. 1932 All. 472.
3. (1926) I.L.R. 49 All. 85.

* C. R. P. No. 869 of 1945. 12th December, 1946.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Mayavaram, dated 20th February, 1945, in A. S. No. 143 of 1944 (E. P. No. 399 of 1943 in S. C. No. 515 of 1939, District Munsiff Court, Mayavaram).

D. Ramaswami Aiyangar for Petitioner.

K. S. Narayana Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner was the endorsee of a promissory note executed by one Rajagopala Ayyar, the father of the respondents, in favour of one Gnanambal. He obtained a decree in S. C. No. 515 of 1939 against the respondents, the undivided sons of the said Rajagopala Ayyar. Originally the decree directed them to pay the decree amount "out of the separate assets of their father." The petitioner applied to this Court to revise the decree (C. R. P. No. 1474 of 1940) and Burn, J., modified the decree by substituting for the words "out of their father the late Rajagopala Ayyar's separate assets" the words "as the legal representatives of their late father Rajagopala Ayyar." In execution of this decree, the petitioner proceeded to attach the joint family properties in the hands of the respondents. The respondents objected to the attachment on the ground that the petitioner was a decree-holder in a suit on an endorsed promissory note and the suit being only on the promissory note he could not have any decree that can bind the joint family properties. The only point for consideration therefore was whether the joint family properties could be proceeded against in execution of the decree. The learned District Munsiff of Mayavaram overruled the objection of the judgment-debtors and allowed execution to proceed against the joint family properties. There was an appeal by the judgment-debtors to the Subordinate Judge of Mayavaram who reversed the decision of the learned District Munsiff and dismissed the execution petition on the ground that the joint family properties were not liable to be proceeded against. He was of the opinion that section 53 of the Code of Civil Procedure did not apply to the decree in question. He followed the decision of Horwill, J., reported in *Natarajan Chettiar* v. *Perumal Ammal*[1] and though he referred to the decision of Chandrasekhara Aiyar, J., in *Pothuraju* v. *Appala Naidu*[2], he thought that this decision would not be of any help to the petitioner.

The question for decision in my opinion really lies within a very short compass. We are not now concerned with the question as to the proper decree which should have been passed in the circumstances of the case. There was a final decree and it was not open to the executing Court to go behind it. The suit was brought on a promissory note against the legal representatives of the maker and a decree was passed against them as the legal representatives of their father. No doubt ordinarily a decree passed against the legal representatives of the original debtor can only be executed against the property of the deceased debtor in the hands of the legal representatives. According to the well-accepted notions of Hindu law when a father dies, it cannot be said with reference to the joint family property that he leaves behind him any property which goes into the hands of his sons. The result would be that a decree against a father would be incapable of being executed against the joint family property after the father's death. But by virtue of the special provision contained in section 53 of the Code of Civil Procedure the property in the hands of a son or other descendant which is liable under Hindu law for the payment of a debt of a deceased ancestor in respect of which a decree has been passed is deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

The question in short in this case is whether the joint family property in the hands of the respondents is liable under Hindu law for the payment of a debt of their deceased ancestor, *viz.*, their father. It is not the respondents' case that the debt is immoral or illegal. It follows therefore that the joint famil properties in

1. (1942) 2 M.L.J. 668. 2. (1944) 2 M.L.J. 82.

the hands of the respondents would be liable to be proceeded against in respect of a decree passed for the payment of the debt of their father.

The argument of Mr. K. S. Narayana Ayyangar is this: As the suit was not on the debt of which the promissory note was evidence, but on the promissory note itself by an endorsee, section 53 of the Code of Civil Procedure is not attracted as it cannot be said that there is any debt of a deceased ancestor for which the joint family property in the hands of the sons is liable. He relies for his contention on the Full Bench ruling in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[1]. That ruling has nothing to do with the point arising for decision in this case. The fact that in a suit by an endorsee of a promissory note who is not also the transferee of the debt evidenced by the promissory note, no one can be liable except the executant does not mean that there is no debt due by the executant. All that has been said in the decisions on this aspect of the case really deals with the frame of the action and relates to certain consequences which follow from provisions of the Negotiable Instruments Act including the question of the burden of proof. There is nothing in any of the decisions to support the contention of Mr. Narayana Ayyangar that when an ordinary endorsee, that is an endorsee not being a transferee of the debt, sues on the promissory note he is not suing to recover the debt. What he is seeking really to recover is on the basis of a debt which must be treated in law as the debt of only the maker on the instrument. It may be that the amount advanced under the promissory note was utilised for the purpose of the family, but if the plaintiff seeks to make the members of the family liable for the money advanced to them through their manager, whether he be the father or not, then he must allege and establish that the debt was so advanced. This obviously cannot be done by a person who is in the position of merely an endorsee without being a transferee of the debt. He cannot allege and establish that he is entitled to obtain relief against the members of the family other than the executant. All these considerations do not negative the existence of a debt due by the maker himself. In fact it is on this debt that the decree is passed. That is why as the learned Advocate for the respondents himself conceded even if a decree be passed in favour of a mere endorsee of a promissory note against the father as the maker, still such a decree can be executed against and satisfied from out of the entire joint family property of the father and the sons. In this case as the father was dead, the sons were sued as the legal representatives of the maker. The decree was passed on the debt due by the maker. In this case he happens to be the father of the defendants. These facts clearly bring the case within the scope of section 53 of the Code.

I may also mention that the narrower view taken by Horwill, J., in *Natarajan Chettiar* v. *Perumal Ammal*[2] has been overruled by the ruling of the Bench in *Venkataswami* v. *Tata Reddi*[3] but these are cases which deal with the proper decree to be passed and not as to what properties can be proceeded against in execution of a decree against the legal representatives of a deceased debtor when the debtor happens to be the father. The lower Court was clearly wrong in dismissing the execution petition.

It was further contended by Mr. Narayana Ayyangar that assuming the learned Judge made a mistake in law, that would not be a ground for interference under section 115 of the Code of Civil Procedure and cited to me well-known decisions like *Amir Hassan Khan* v. *Sheo Baksh Singh*[4], *Kristamma Naidu* v. *Chapa Naidu*[5] and *Balakrishna Udayar* v. *Vasudeva Ayyar*[6]. But the view I take of the case is this: Burn, J., deleted from the decree originally passed the words 'out of the separate assets of their father' and passed a decree against the respondents 'as the legal representatives of their late father Rajagopala Ayyar'. The view taken by the lower appellate Court on a mistaken notion of the law is really inconsistent with

1. (1938) 1 M.L.J. 378: I.L.R. 1938 Mad. 568 (F.B.).
2. (1942) 2 M.L.J. 668.
3. (1946) 2 M.L.J. 361.
4. (1884) L.R. 11 I.A. 237: I.L.R. 11 Cal. 6 (P.C.).
5. (1894) I.L.R. 17 Mad. 410 (F.B.).
6. (1917) 33 M.L.J. 69: L.R. 44 I.A. 261: I.L.R. 40 Mad. 793 at 799 (P.C.).

the decree as passed by Burn, J. The effect of the lower appellate Court's order is practically to confine the decree to the separate assets of Rajagopala Ayyar in the hands of the respondents. The executing Court acts without jurisdiction, if, by a wrong understanding of the law, it goes behind the decree. Though the decree is passed against the respondents as legal representatives and such a decree can be executed against the joint family property in their hands as the sons of their father, the learned Subordinate Judge has held that the decree-holder cannot proceed in execution against the joint family properties. In my opinion this is clearly a ground of interference contemplated by section 115 of the Code of Civil Procedure. In the result the civil revision petition is allowed with costs. The petitioner will also be entitled to his costs in the lower appellate Court.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

Miyala Narasimhacharya and others .. *Petitioners (Accused)**

Criminal Procedure Code (V of 1898), section 350 (1), proviso (a)—Scope—Commencement of proceedings before succeeding Magistrate—Crucial date—Right of accused to have witnesses re-summoned and re-heard—Long lapse of time between date of offence and setting aside of conviction on ground of illegality in procedure—If ground for not ordering a re-trial.

Commencement of proceedings within the meaning of proviso (*a*) to section 350 (1) of the Criminal Procedure Code means an effective commencement of the proceedings and not a mere posting of the case from one date to another. When the trial is effectively commenced the accused may demand that the witnesses or any of them may be re-summoned and re-heard.

Long lapse of time between the setting aside of a conviction on the ground of illegality of procedure and the date of the offence is not a ground for not ordering a re-trial.

The Public Prosecutor v. *Kadiri Koya*, (1915) 29 M.L.J. 101 : I.L.R. 39 Mad. 527 (F.B.), distinguished. Decision of Happell, J., in Cr. R. C. No. 450 of 1944, followed.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sessions Judge, South Kanara, dated 4th March, 1946 and made in C. A. Nos. 1 to 4 of 1946 (C. C. Nos. 138 to 142 of 1943, Sub-Divisional Magistrate's Court, Coondapur).

V. T. Rangaswami Ayyangar, D. B. Jagannatha Rao, L. S. Raju, G. Gopalaswami and *S. Venkatachalam* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The same point arises in these four criminal revision cases which can therefore be conveniently dealt with together. Crl. R. C. Nos. 268, 269, 270 and 271 of 1946 have arisen respectively out of C. C. Nos. 138, 139, 140 and 142 of 1943 on the file of the Sub-Divisional Magistrate, Coondapur. The sole accused in C. C. No. 138 of 1943 is one Miyala Narasimhacharya who held two powers of attorney from the previous Swamiar of Sri Pejawar Mutt in Udipi who died on 16th October, 1939. The accused is said to have continued in management of the affairs of the Mutt even thereafter. It is alleged that he was entrusted with and was having dominion over certain gold jewels belonging to the said Mutt. In C. C. No. 139 of 1943 Narasimhacharya is the first accused and the second accused is a person who is described as his shanbhogue. Narasimhacharya and a clerk are the accused in C. C. No. 140 of 1943. The sole accused in C. C. No. 142 of 1943 is a person who is described as a Kottari. Narasimhacharya has been convicted under section 409 of the Indian Penal Code. The second accused in C. C. No. 139 of 1943 and the second accused in C. C. No. 140 of 1943 have each been convicted in the alternative under section 409 read with section 109 of the Indian Penal Code or under section 411 of the Indian Penal Code or under section 414 of the Indian Penal Code. The accused in C. C. No. 142 of 1943 has been convicted

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* Crl. R. C. Nos. 268 to 271 of 1946. 7th February, 1947.
(Crl. R. P. Nos. 261 to 264 of 1946).

under section 411 of the Indian Penal Code or section 414 of the Indian Penal Code. All these convictions have been upheld by the Sessions Judge of South Kanara. The offences in C. C. No. 138 of 1943 are said to have been committed on or about 14th December, 1938, 10th January, 1939 and 4th September, 1939. In C. C. No. 139 of 1943, the offences are said to have been committed in or about September, 1939. In C. C. No. 140 of 1943 the offences are said to have been committed in or about December, 1938 and in C. C. No. 142 of 1943 the offences are said to have been committed on or about 17th May, 1939, 4th September, 1939 and 3rd February, 1940. It is unnecessary to refer to the sentences in any detail.

The cases were pending on the file of the Sub-Divisional Magistrate, Coondapur, for a considerable time for the further cross-examination of P. W. 12 who was very ill and were being adjourned from time to time. On 30th June, 1945, the Magistrate adjourned the cases to 12th July, 1945, for the same purpose; but before 12th July, 1945, the Magistrate who had heard the cases previously was transferred and another Magistrate was posted in his place. The cases however had still to be adjourned several times as P. W. 12 continued to be ill. On 13th September, 1945, the accused in the several cases applied under section 350 (1), proviso (*a*) of the Code of Criminal Procedure that all the prosecution witnesses might be re-summoned and re-heard. The Magistrate however refused the request holding that if the accused desired to avail themselves of the right conferred by section 350 (1), proviso (*a*) of the Code of Criminal Procedure they should have applied on the 12th July, 1945, when the cases were called on before him or on any of the subsequent dates to which the cases were being re-posted. The trial proceeded resulting in convictions as already stated.

It is argued by Mr. Rangaswami Ayyangar, advocate for the petitioners in Crl. R. C. Nos. 268, 269 and 270 of 1946 that the accused were quite within their right in asking that the prosecution witnesses should be re-summoned and re-heard on 13th September, 1945. This argument was adopted by Mr. Gopalaswami who appeared for the petitioner in Crl. R. C. No. 271 of 1946. Section 350 (1) and proviso (*a*) run as follows:

> "Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may re-summon the witnesses and re-commence the inquiry or trial:
>
> Provided as follows: (*a*) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard."

The question that arises is whether the second Magistrate can be said to have commenced his proceedings at any date before the 13th September, 1945. The argument is that at no earlier date was there any effective commencement of the proceedings by him and that the cases were simply being adjourned from one date to another. There is direct authority in support of this argument in the judgment of Happell, J., in Crl. R. C. No. 415 of 1944. The judgment of the learned Judge does not set out the facts of that case but it appears from the order of the Additional First Class Magistrate, Villupuram, which was revised by Happell, J., that in that case too the accused was attending the Court on two occasions, 14th April, 1944, and 21st April, 1944, after the new Magistrate took charge and that the application for the re-summoning and re-hearing of the witnesses was made only on 9th May, 1944. The learned Public Prosecutor admits that this is the only direct ruling on the matter. I respectfully agree with it, and in my opinion, commencement of proceedings within the meaning of the proviso means an effective commencement of the proceedings and not a mere posting of the case from one date to another. In view of this defect of procedure which is not curable by section 537 of the Code of Criminal Procedure, the convictions and sentences of all the petitioners in the several cases must be set aside.

Mr. Rangaswami Aiyangar argued that in view of the long lapse of time between the dates of the several alleged offences and now, no re-trial need be ordered. He

referred to the case in the *Public Prosecutor* v. *Kadiri Koya*[1] as an instance where a Bench of this Court refused to order re-trial while setting aside a conviction on the ground of illegality of procedure and also placed considerable reliance on what he regarded as the halting nature of the finding in the matter of the identity of the jewels. After giving the matter my best consideration, however, I think that a re-trial should be ordered in the interests of justice. It would be noticed that notwithstanding that the offences are alleged to have been committed in 1938 and 1939 the cases were actually disposed of by the Sub-Divisional Magistrate, Coondapur, only on 29th December, 1945. Moreover, it was open to the accused to have come up to this Court in revision against the order of the Magistrate dated 18th September, 1945, refusing to re-summon and re-hear the prosecution witnesses and the matter would then have been immediately set right. They permitted the proceedings to go on, and I do not think they should be permitted to rely upon the delay that has taken place since then as a ground for refusing a re-trial. The circumstances in the *Public Prosecutor* v. *Kadiri Koya*[1] were essentially different from those in the present cases. I do not consider it desirable to discuss the nature of the finding as to the identity of the jewels which Mr. Rangaswami Ayyangar characterised as a halting finding but which the learned Public Prosecutor claims as all that could possibly be given in the circumstances.

The convictions and sentences are therefore set aside, and the cases are directed to be re-tried.

K.S. — *Re-trial ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE GOVINDARAJACHARI.

Chinna Venkata Reddi, minor represented by his guardian and mother Chennamma .. *Appellant**

v.

R. Sidda Reddi and others .. *Respondents.*

Hindu Law—Partition—When complete—Son born after agreement to divide and separate enjoyment of shares in pursuance thereof—Slight modification of division thereafter benefiting the branch of such newly-born son—Right of such after-born son to challenge the partition arrangement.

A partition is completed when the title in the different shares has passed to the persons who have divided. So far as immoveable properties are concerned, the title passes either by the execution of a registered instrument or by an agreement to divide coupled with a transfer of possession. If there is an agreement to divide in certain shares and those shares without any division by metes and bounds come into the separate enjoyment of the various sharers, there is such a transfer of possession as would make each of the sharers completely entitled to the undivided share which is in his enjoyment.

Where parties had agreed to hold the family lands in four equal shares and in pursuance of the agreement each of the sharers had entered into the enjoyment of the income of one-fourth of the lands and became separately liable for the expenses of their shares, the fact that there was a subsequent modification of this division by a compromise decree only to the extent of giving to the branch of a son born after the partition arrangement a greater share than previously enjoyed, does not give a right to such after-born son to challenge the partition arrangement made effective before his birth and was only subsequently modified to his own advantage.

Appeal against the decree of the Court of the Subordinate Judge of Chittoor, dated 6th November, 1944, in O. S. No. 80 of 1943.

The Advocate-General (*K. Rajah Aiyar*) and *D. Narasaraju* for Appellant.

Sir A. Krishnaswami Aiyar, *N. C. Vijayaraghavachari* and *N. C. Srinivasan* for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellant, a minor, brought the suit out of which this appeal arises, to reopen a prior partition effected between his father's branch and three other branches of the family and he also prayed for a declaration that the

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1. (1915) 29 M.L.J. 101 : I.L.R. 39 Mad. 527 (F.B.).

* Appeal No. 147 of 1945. 29th November, 1946.

compromise decree for partition in O. S. No. 66 of 1938 on the file of the Subordinate Judge's Court, Chittoor, was not binding on him as he was not impleaded in that suit. The appellant was born on the 7th February, 1940. The family to which he belongs consisted originally of two sons of one Chowdi Reddi (one of these sons was the appellant's great grandfather, Sidda Reddi). The other son was Thimma Reddi, who had three sons, each of whom is now represented by his descendants. We are therefore concerned with a family consisting of four branches, that to which the plaintiff belongs being entitled under the ordinary Hindu Law, to a half share in all the properties. It was, however, alleged that the properties of the family had been largely increased by the efforts of the other branches and that consequently they had been recognised as having a claim to more than their ordinary shares in the property.

The first agreement with which we are concerned is Ex. D-1 dated 12th September, 1929, under which the representatives of the four branches agreed to divide the properties in four equal shares. The actual writer of this agreement was the appellant's uncle who is the first defendant in the suit. On 19th September, 1932, there was a reference to arbitration executed by the representatives of the four branches for a division on the basis of the agreement, Ex. D-1. But it does not appear that this arbitration was effective. In 1933 there was a suit filed by certain agnates of the family, who claimed a half share in the family lands. In this suit, the appellant's father and uncle filed a written statement in which they recited that they had received Rs. 8,500 from the common funds and had agreed to take one-fourth share in the rest of the properties. That suit was settled and we are not now concerned with the claim of those agnates. At the end of 1934, the four branches met together and divided all the moveables of the family and also the houses. There was no actual division by metes and bounds of the lands, except, possibly, of certain items about which there is varying evidence. But it seems to have been established,—and has, in fact, been conceded by Mr. D. Narasaraju, Advocate for the appellant—that from 1935 onwards, the income of all the lands was enjoyed in four equal shares by the four branches and each branch paid one-fourth of the kist of the lands.

On 25th May, 1936, the representatives of the four branches executed an agreement, Ex. D-3, which recites the previous division of the moveables and the failure to divide the lands and refers to arbitration the division of all the lands into four equal shares, the parties agreeing to abide by the decision. In 1938, the plaintiff's father and uncle filed O. S. No. 66 of 1938 against the members of the other three branches, in which they claimed that their branch was entitled to the sole right in certain Reddi inam lands and to a half share in the rest of the lands of the family. This suit was contested and, in the end, there was an arbitration, as a result of which the plaintiff's branch was given the sole right in certain lands and the rest of the lands were to be divided in four equal shares. The date of this award was 11th June, 1939. The suit itself was actually compromised on a slightly different basis, the appellant's branch being given two more items of property not included in the award. This compromise decree was passed on 9th March, 1940, just over a month after the birth of the appellant who was not impleaded in the suit.

The position, therefore, is that at the time of the appellant's birth all the branches had bound themselves by an agreement to divide the rest of the properties in four equal shares, the appellant's branch having been given cash consideration, to induce them to accept this arrangement. The actual division of the properties had reached the stage of a complete allotment of the moveables and houses and the separate enjoyment of the income of the lands and separate payment of the expenses connected therewith. The appellant's father and uncle were trying to get more than they had agreed to accept and just after the appellant's birth they succeeded in getting some six acres of land in addition to the one-fourth share in the rest of the lands. To the extent to which this compromise decree modified the previous arrangement it is undoubtedly to the benefit of the appellant's branch.

It is contended by Mr. D. Narasaraju, advocate for the appellant, that at the time of the appellant's birth, so far as the lands were concerned, there was a mere executory contract to divide at a future date and no transfer of title in the lands such as would bar a claim by the minor to an equitable re-division of those lands. He has quoted before us the decision in *Ponnambala Pillai* v. *Sundarappier*[1], which recognised that a son born after his father had executed an agreement to sell the family property and before the completion of the sale could challenge a subsequent transfer on the ground that the agreement was not binding on himself in the absence of any necessity. He has also cited the decision in *Kishan Lal* v. *Lachmi Chand*[2], where it is pointed out that there can be no partition of immoveable properties without either a registered deed or a transfer of possession; and he has called in aid the rule which enables an after-born son to challenge even a completed partition effected by his father in case no share is allotted to the father. This latter rule is based on special considerations and on actual texts. It has no logical foundation and cannot be the starting point for further extensions.

The position seems to be perfectly clear. A partition once completed cannot be challenged by an after-born son except to the extent just referred to. A partition is completed when the title in the different shares has passed to the persons who have divided. So far as immoveable properties are concerned, the title passes either by the execution of a registered instrument or by an agreement to divide coupled with a transfer of possession. If there is an agreement to divide in certain shares and those shares without any division by metes and bounds come into the separate enjoyment of the various sharers, there is, in our opinion, such a transfer of possession as would make each of the sharers completely entitled to the undivided share which is in his enjoyment. That is what seems to have happened in the present case with reference to the lands. The parties agreed to hold those lands in four equal shares and in pursuance of that agreement each of the sharers entered into the enjoyment of the income of one-fourth of the lands and became separately liable for the expenses of their shares; that is to say, the undivided share was transferred to the possession of each of the branches. The subsequent modification of this division by the compromise decree was only to the extent of giving to the appellant's branch a greater share than was previously enjoyed. In such circumstances it seems to us that the appellant cannot challenge an arrangement which was made effective before his birth and was only subsequently modified to his own advantage. In this view, we dismiss the appeal with costs of respondents 5 to 20 (one set).

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE BELL.

D. Chenchiah and others .. *Petitioners**

v.

The Commissioner of Police, Madras and others .. *Respondents.*

Madras Ordinance (I of 1947)—Arrests under the ordinance earlier in the day and prior to its promulgation later in the day in the Fort St. George Gazette—Legality—Interpretation of Statutes—Act, when comes into force.

On a question whether certain arrests made on the 23rd of January, 1947, at 4-30 or 5 A.M., under Madras Ordinance I of 1947, which was published only later in the day in the Fort St. George Gazette were legal,

Held, as it was well settled that an Act which comes into force on any particular day is deemed to have effect from the first moment of that day and as the law takes no account of fractions of a day, the Ordinance in question must be deemed to have had effect from midnight of the 22nd-23rd January, which means that it was in operation at the time when the arrests were made and consequently the arrests were not illegal.

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1. (1897) 7 M.L.J. 240 : I.L.R. 20 Mad. 354. 2. A.I.R. 1937 All. 456.

* Crl. M. Ps. Nos. 99, 100 and 112 to 121 of 1947. 5th February, 1947.

Petitions praying that in the circumstances stated in the respective affidavits filed with the petitions, the High Court will be pleased to issue directions in the nature of a *Habeas Corpus* directing the respondents to produce the respective petitioners before the High Court and set them at liberty.

A. Ramachandran for *Messrs. Row and Reddy* for Petitioners.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of Respondents.

The Judgment of the Court was delivered by

Horwill, J.—On the 23rd January, 1947, at 4-30 or 5 A.M., the twelve petitioners were arrested by police officers; but were not told why they were arrested, or under whose orders they were arrested, or even under what provision of law. From their homes they were taken to the Central Jail at Vellore. Later on, during the working hours of the Government Press, Ordinance I of 1947, signed by the Governor of Madras, was published in the Fort St. George Gazette of that day, Part IV-B, Extraordinary, which empowered the Provincial Government or the Chief Presidency Magistrate to issue an order for the detention of any person, if the Provincial Government or the Chief Presidency Magistrate, as the case might be, was satisfied that it was necessary to detain that person with a view to prevent him from acting in any manner prejudicial to the public safety or to the maintenance of public order. In the course of the same day, two of the petitioners filed applications under section 491 of the Code of Criminal Procedure for the issue of writs of the nature of *Habeas Corpus* directing the Government of Madras to produce the petitioners before the Court. Neither the Chief Presidency Magistrate nor the Superintendent of the Central Jail, Vellore, was impleaded, as it was not then known who had issued the order for arrest or where the petitioners were detained. On Monday, the 27th January, the remaining petitioners filed petitions asking for the same reliefs.

It was alleged that these petitioners were illegally arrested and detained, because they were not told by the police officers arresting them under what authority the arrests were made. Having since become acquainted with Ordinance I of 1947, two arguments have been put forward on behalf of the petitioners. The first is that the arrests were illegal, because they were effected at a time when the Ordinance had not become law, in that it had not, as required by section 88 of the Government of India Act, been promulgated. The second is that the requirements of section 4 of the Ordinance had not been complied with, in that the petitioners had not been informed on what grounds they had been detained.

When the matter came on for hearing on Wednesday, the 29th January, no reasons had by then been given to the petitioners. On that day the petitions were adjourned to give the learned counsel for the petitioners an opportunity of meeting the points raised by the learned Crown Prosecutor and of impleading the Chief Presidency Magistrate, who was found to have issued the order. On Friday, the date to which the petitions were adjourned, an affidavit was filed by the Chief Presidency Magistrate to the effect that he had given reasons to the petitioners, that he had informed them that they could make representations against the orders concerning them, and that he would give them every facility to do so. In view of this affidavit, it is unnecessary to say very much with regard to the second point raised by the learned counsel against the validity of the detention. It is very difficult, without having before us all the material available, to decide whether or no the Presidency Magistrate was justified in not communicating to the petitioners for more than a week the grounds on which his order had been based; but as he presumably knew the grounds before he issued the order, one would have expected him to have furnished the petitioners with the reasons for their arrests and detention within a day or so. Since, however, the reasons were subsequently furnished, we should not be justified in ordering the release of the petitioners on the ground of this delay.

The more important question is whether the arrests of the petitioners were illegal, because at the time of their arrests, the Ordinance had not become

law. It is not denied by the learned Crown Prosecutor that publication in the Fort St. George Gazette was necessary to give the Ordinance the force of law; and it is true that the petitioners were arrested before the act of promulgation had taken place. It is however well-known maxim of the law regarding the interpretation of Statutes that the law takes no account of fractions of a day, for the very practical reason that it is ordinarily impossible to know the moment at which an Act came into force.

It is well settled that an Act which comes into force on a particular day is deemed to have effect from the first moment of that day. Applying that principle to the facts of this case, the Ordinance must be deemed to have had effect from midnight on the night of the 22nd, 23rd, which means that it was in operation at the time when the petitioners were arrested. It is unnecessary to cite authorities for the proposition that a statute begins to operate from the first moment of the day on which it becomes law; because the learned advocate for the petitioners does not in general deny it. That the law in India on this subject is the same as in England is indicated by a decision of this Court in In re *Court-Fees*[1], in which case the Government announced an increase in court-fees on the 5th May, 1922, which was not published until after certain suits had been filed on the Original Side of the High Court. It was nevertheless held that the plaintiff was bound to pay the enhanced court-fee on the plaints filed by him on that day.

The learned advocate for the petitioners has pointed out the difference between the wording of section 3 (12) of the Imperial General Clauses Act and that in section 3 (7) of the Madras General Clauses Act in the definition of the word "commencement," as used with reference to an Act or Regulation. Whereas the Imperial General Clauses Act defines "commencement" as meaning the *day* on which the Act or Regulation comes into force, the Madras Act—with which we are here concerned—defines "commencement" as meaning the *time* at which the Act comes into force. There is no reason, however, to think that the Madras Legislature, in framing the definition of "commencement," meant to give a different meaning to that word from that given by the Imperial Government and to depart from the long-recognised interpretation, whereby fractions of a day are ignored and the Statute deemed to come into force at the first moment of the day on which it becomes law.

Section 1 (3) of the Ordinance says that it shall come into force "at once," from which it is argued that it came into force at the moment that it became law, *i.e.*, was published. Our attention has not been drawn to any—Act, Ordinance or Statute in which the expression "at once" has been used. 35 and 36 Vict., c. 65, S. 3, provided for an application for an order of affiliation . . . . "after the passing of this Act". In interpreting this clause the learned Judges in *Tomlinson* v. *Bullock*[2] held that this meant that the Act came into immediate operation, which was construed as meaning the 10th of August, 1872, the day on which the Act became law. They therefore held that the Act operated from the first moment of that day and therefore applied to a child born at any time of that day, even though the child might have been born before the royal assent was given to the Act.

Our attention has not been drawn to any instance since the 'Acts of Parliament' Act of 1793 in which a person has been found guilty of having committed an offence, when the Act constituting the offence was not at the moment at which it was done an offence. Nor have we been shown any case since that year in which a person has been made liable for arrest for an act for which he was not liable to be arrested at the moment that he did it, presumably because care is ordinarily taken to see that Penal Statutes, even by a legal fiction, do not have retrospective effect, thereby violating an elementary principle of justice that a man should not be punished for an act that was not punishable at the time when it was committed. A violation of this elementary principle has indeed occurred in this case; but it is hoped that the purpose of effecting the arrests at such an early hour before the Ordinance had been promulgated was not to take shelter behind a technical point

1. (1922) 45 M.L.J. 557: I.L.R. 46 Mad. 685 (S.B.).
2. (1879) 4 Q.B.D. 230.

in the interpretation of Statutes in order to be able to violate this elementary principle of justice with impunity. However that may be, we are unable to say that the arrests of the petitioners were illegal. The petitions are therefore dismissed.

We have been asked to grant a certificate under section 205 of the Government of India Act to enable the petitioners to appeal to the Federal Court. The questions discussed in these applications do not however involve any interpretation of the Government of India Act, still less of any order in Council. The matters argued before us relate to the interpretation of Ordinance I of 1947 and to a general rule regarding the interpretation of a Statute. It is true that the learned advocate for the petitioners raised a question as to the meaning of "promulgation" in section 88 of the Government of India Act; but the learned Crown Prosecutor conceded the correctness of the view of the petitioners' learned advocate that "promulgation" meant publication, and that publication in the Fort St. George Gazette was necessary in order to make the ordinance signed by the Governor effective. No certificate will therefore be granted.

V.S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE BELL.

Bheemavarapu Subba Reddi and another .. *Accused* 1 & 2.*

Criminal Procedure Code (*V of* 1898), *section* 161 (3) (*new*)—*Investigating officer—Duties—Recording of statements—Proper procedure.*

Per *Bell, J.*—It is not the law that the police officer must record individual statements under section 161 of the Criminal Procedure Code which specifically says that he 'may' and not that he 'must' reduce the statement of a witness into writing. Nothing is more natural than that he should make rough notes of information which later he would set out in proper form in the case diary for the information of his superior officers in whose hands after all, lies the subsequent control of the matter.

Per *Horwill, J.*—It does not seem that the new sub-section (3) of section 161 of the Criminal Procedure Code was intended to make it incumbent upon the investigating officer to record a statement in greater detail than was the practice prior to the amendment. This new sub-section seems to hit at the practice of writing against the names of certain witnesses that they corroborate the statements of the earlier witness. Statements should be recorded where reasons of urgency do not preclude this course or unless the exigencies of the investigation make such recording undesirable.

Trial referred by the Court of Session of the Kistna Division for confirmation of the sentences of death passed upon the said Prisoners in Case No. 19 of the Calendar for 1946 and Appeal by the said accused.

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* and *V. V. Radhakrishnan* for 1st and 2nd Accused.

The Assistant Public Prosecutor (*A. Sivakaminathan*) on behalf of the Crown.

The Court delivered the following

JUDGMENTS: *Bell, J.*—The appellants are a brother and a sister who were charged respectively with the murder and abetment of murder of one Guntaka Somireddi in the village of Nunna on 13th May, 1946. They were both sentenced to death.

[His Lordship after discussing the facts and evidence proceeded to consider the objection as to the method of investigation.]

Mr. Jayarama Aiyar, however, has raised a point to which some attention must be given. He says that the method of investigation employed by the police was such as to deprive the accused and his advisers of the assistance or opportunity which the Criminal Procedure Code provides for scrutinising the evidence called for the prosecution. He based his contention in the main on the evidence of P. W. 14, the Circle Inspector, and on that of P. W. 13 the Sub-Inspector, to a smaller

* R. T. No. 161 of 1946. 22nd January, 1947.
(Crl. Appeal Nos. 704 and 705 of 1946).

extent. P.W. 13 in cross-examination said that he collected the witnesses and kept them ready for investigation by his superior officer. He said that he did not examine any witness and that that was done by the Circle Inspector. The witnesses, he said, were examined separately and they were asked to state what they knew. As they were being examined, the Circle Inspector took some notes. The Circle Inspector, P. W. 14, says that he examined P. Ws. 1 and 6 to 9 and 11 besides five others.

"I examined witnesses. From my case diary I cannot say whom I examined first and whom I examined second and so on. I cannot say from my case diary as to what each witness stated. I cannot also state from my memory. I took down my own notes. I first asked one by one what the witnesses knew of the offence and then took my own notes and questioned the witnesses again by way of verification of what notes of events I had taken down. In my notes I took a summary of what all the witnesses stated. Those notes will also give an idea of what each witness stated if carefully gone through. On the same day I elaborated it into the form I have in my case diary. I took into account all the reports, inquest report, mediators' report, first information report, etc. I have my rough notes with me. They are not required to be sent anywhere. There is no prescribed rule under which these rough notes should be filed . . . . . . As it is not necessary to prepare individual statements, I did not prepare any."

On these words Mr. Jayarama Aiyar builds up the contention that the police failed in their duty in not taking individual statements from each witness and preserving them so that they could have been available if required for the accused and his advisers to check the evidence given in the witness box by the various witnesses.

He has referred us to sections 160, 161, 162 and 172 of the Criminal Procedure Code. Section 160 provides that a police officer has power to require the attendance of any person who appears to be acquainted with the circumstances of the case. Section 161 provides that when such a person has been ordered to attend, the police officer may examine him orally as to the facts and circumstances of the case. Such person is bound to answer any questions put to him by the police officer, unless they would tend to incriminate him. By a recent amendment, Act II of 1945, it is provided that if the police officer thinks fit he may reduce into writing any statement made to him in the course of his investigation, and if he does so, he must make a separate record of the statement of each person. If the police officer so decides, and a statement is taken from the individual witness, then under section 162 that may be used in the circumstances provided for in that section. Under section 172 there is a general direction that every police officer making an investigation must compile a diary day by day. Whether he does so from memory or by means of notes taken by him at the time is not provided and it would seem that the circumstances of each case must be considered if and when the conduct of the police in conducting an investigation is questioned.

In this case on a plain reading, as it seems to us, of the Circle Inspector's evidence, he interviewed various witnesses and asked them one by one what they knew about the events. He then made some notes of what they said and asked them again as to whether the effect of his notes was correct. He was in fact preparing the material for the case diary which he was bound to compile some time during the day. He says that he took no individual statement from any witness although he says that his notes and the case diary would give some idea of what each witness had said. One must not forget that P. Ws. 1, 2, 8 and 10 spoke about their own knowledge of the events which was not the evidence of the eye-witnesses. P.Ws. 6 and 7 only spoke to the murder and their evidence is practically the same. It has been held recently in *Guruva Vannan*, In re[1], that it is not the duty of the investigating officer to do more than record a gist of the statement made to him. To require otherwise would paralyse any investigation of the kind which took place in this case. Mr. Jayarama Aiyar has urged that the police officer must deliberately have refrained from taking individual statements and contented himself with rough notes in order to prejudice the accused at his trial. We can see no basis for the contention. It is no doubt desirable as was pointed out in *Baliram Tikaram* v. *Emperor*[2], that notes however and whenever taken by the police officer should be

1. (1944) 1 M.L.J. 253.   2. I.L.R. (1945) Nag. 151.

preserved. In that case the rough notes taken by the police officer had been destroyed. In this case the Circle Inspector in the witness-box in the Sessions Court said that he had his rough notes in his pocket. No request was made by counsel for the accused that they should be produced so that he might read them. If such a request had been made, it would unquestionably have been granted. In fact, while the case was in the committing Court, an application was made by the legal advisers of the first accused for copies of the section 162 statements, if any, and the reply was given not only then, but again in the Sessions Court that there were no such statements. The authorities however at once tendered the case diary in order to assist the accused in every way that was possible. We have looked at the case diary and also at the rough notes which we caused to be sent here, and it is clear to us that the case diary is merely an amplification of the rough notes taken by the investigating officer. The officer has sworn that he took no other statements, and we think that no criticism can be made of his conduct. Whatever there was in the way of documents was made available to the advisers of the accused at the earliest possible opportunity. The learned Sessions Judge has observed that " the defence has been given an opportunity of perusing all the statements recorded in the diary and the learned Public Prosecutor has discharged his duties on behalf of the Crown in an exceptionally impartial manner and has given all the co-operation to the defence counsel necessary to make section 162, Criminal Procedure Code work smoothly, with the consent of this Court." He adds that he is unable to find any ground for complaint by the counsel for the defence and we agree with his conclusion. It cannot, we think, be the law that a police officer investigating a crime has only two alternatives, *viz.*, to record nothing, or to take a separate statement from each witness. It is not the law, we think, that the police must record individual statements under section 161 which specifically says that he may and not that he must reduce the statement of a witness into writing. To expect the police officer to compile his case diary from memory is also, we think, absurd; and indeed might in certain circumstances be most undesirable. Nothing is more natural than that he should make rough notes of information which later he would set out in proper form in the case diary for the scrutiny of his superior officers in whose hands, after all, lies the subsequent control of the matter.

We think therefore that there is no substance in the point raised by Mr. Jayarama Aiyar. Apart from that, the evidence, we think, is more than adequate to support the prosecution case against A-1. This was a brutal murder, the deceased being killed while he was asleep. There appears to be no extenuating circumstances. In our opinion the conviction of A-1 and the sentence imposed upon him should be confirmed and his appeal dismissed.

Horwill, J.—I would like to add a word or two on the objection taken by Mr. Jayarama Aiyar to the form of the police records and to the procedure adopted during the trial.

Two questions arise: (1) whether the investigating officer committed any irregularity which vitiated the proceedings, and (2) whether the defence was in any way prejudiced by the manner in which the proceedings took place in the lower Court and the police records examined.

It has been generally held by all the High Courts of India that it is not necessary for the Investigating Officer to record verbatim what the various witnesses tell them. For example Mockett, J., said in *Guruva Vannan*, In re[1]:

> " It is not the duty of the Investigating Officer to do more than record a gist of the statements made to him."

Since that judgment was pronounced, however, there has been an amendment of section 161, Criminal Procedure Code; and Mr. Jayarama Aiyar argues that it is now incumbent upon the police, if they write anything at all during the course of their investigation, to record a verbatim statement. The new sub-section runs:

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1. (1944) 1 M.L.J. 253.

"The Police officer may reduce into writing any statement made to him in the course of an examination under the section, and if he does so, he shall make a separate record of the statement of each such person whose statement he records."

It is difficult to believe that the Legislature intended by this amendment that an Investigating Officer should record a statement of every person examined with the same meticulous care as a court records a deposition; for that would be losing sight of the principal purposes of an investigation, which are to detect the offence, arrest the accused, and to file a charge-sheet before the competent Court. There may be circumstances in which an investigation can proceed at leisure; but it may often be the case that an Investigating Officer has time only to record the outlines of what has been said, and then to proceed to something more urgent, such as the arresting of the accused or the recovery of property. Undue delay in examining witnesses might make it much more difficult, if not impossible, to complete an investigation successfully; and it does not seem that section 161 (3) was intended to make it incumbent upon the Investigating Officer to record a statement in greater detail than was the practice prior to the amendment. This new sub-section seems to hit at the practice of writing against the names of certain witnesses after the first that they corroborated the statements of the earlier witness.

If the notes in the present case had been in the form of summaries of statements made by the individual witnesses, then those notes should have been made available to the defence. It is noteworthy that although the notes were on the person of the Inspector during his examination in the Sessions Court, he was not asked to show them. We have examined them in this Court to see if they are mere summaries of statements; and we find that they are not. The entries in the case diary are in the form of a detailed narrative, in which the actions or presence of various witnesses are frequently referred to; so that it is possible to infer from the particulars of the narrative that certain things were seen by certain witnesses, and that they gave certain information. We find that the notes give a very brief summary of the narrative found in the case diary, and do not take the form of summaries of individual statements made by the various witnesses; so that if the police officer had objected to the production of his notes—which he did not—he would have been fully justified in doing so.

The learned Sessions Judge felt—as indeed did the Public Prosecutor—that every concession should be given to the defence, so that they might know what was said and done during the investigation; and so the defence were allowed to examine the case diary. Even if the notes had been inspected, no more information would have been available to the defence. Mr. Jayarama Aiyar has seen the notes and concedes that they are unintelligible to one unacquainted with the records.

Although no irregularity was committed by the taking of notes for the preparation of the case diary instead of recording statements, it seems desirable that statements should be recorded where reasons of urgency do not preclude this course. It can easily be seen that if the practice adopted in this case were generally followed and statements never produced, the discretion given to the Police under section 161, Criminal Procedure Code, might be much abused. An unscrupulous Investigating Officer might record statements, draw up notes suitable for the preparation of the case diary and then suppress the statements, denying their existence. It is often of great assistance to the Court to know what the earlier statements of witnesses were; and an accused who cannot point to contrary statements made by witnesses when first examined, because those statements were not recorded, labours under a disadvantage that should be avoided unless the exigencies of the investigation make the recording of statements undesirable.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

The Public Prosecutor .. *Petitioner**

v.

Atchamma and others .. *Respondents.*

Criminal Procedure Code (V of 1898), sections 476 and 236—Direction to make a complaint for giving false evidence—Witnesses making contradictory statements at different stages of the proceedings—Absence of finding as to which of them is false—Complaint, if vitiated.

Where an order is made under section 476, Criminal Procedure Code, to make a complaint in respect of contradictory statements made by witnesses at different stages of the proceedings, it is wrong to say that the complaint is vitiated by the absence of an express finding as to which of the two statements is false. This view of the law is contrary to the provisions of section 236, Criminal Procedure Code and the principle underlying prosecutions under section 193, Indian Penal Code. Even if it cannot be proved which of the contradictory statements is false a person may be charged and convicted in the alternative of intentionally giving false evidence at one stage or another.

Petitions under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgments of the Court of Session of Cuddappah division, dated 19th March, 1946, in C.A. Nos. 19 to 26 of 1946 respectively (P.R.C. No. 4 of 1945, Sub-Divisional Magistrate, Cuddappah).

The Petitioner in person.

B. Jagannatha Das for Respondents.

The Court made the following

ORDER.—This batch of revision petitions involves a common point which can be disposed of by one judgment. Two sets of statements are said to have been made by the respective respondents in all these cases which are contradictory and the trial Magistrate directed the making of a complaint by means of an order under section 476 of the Criminal Procedure Code. That order was reversed on appeal by the Sessions Judge, Cuddappah. The learned Sessions Judge came to the conclusion on a scrutiny of all the facts in evidence that it is not expedient in the interests of justice to prosecute the respondents for the alleged offence of giving false evidence. With that finding based as it is on evidence I entirely agree.

The learned Public Prosecutor points out that in the course of the judgment, the learned Sessions Judge has committed two errors of law which in the interests of the administration of justice should not be allowed to remain unrectified. The first question relates to the conclusion of the learned Judge that since there was no express finding of the trial Court that one of the two statements was false the complaint was vitiated. I agree with the Public Prosecutor that this view of the law is contrary to the provisions of section 236 of the Code of Criminal Procedure and the principles underlying prosecutions under section 193 of the Indian Penal Code. In fact illustration (*b*) to section 236 of the Code of Criminal Procedure shows that even if it cannot be proved which of the contradictory statements is false a person may be charged and convicted in the alternative of intentionally giving false evidence at one stage or another.

The second point mentioned by the learned Public Prosecutor is based upon the view propounded by the learned Judge relying upon the decision in *Haricharan Singh* v. *Emperor*[1] that the Sub-Divisional Magistrate was not then competent to administer an oath to the respondent when he recorded the first set of

*Cr.R. Cases Nos. 647 to 654 of 1946. 5th February, 1947.
(Cr.R. Petitions Nos. 620 to 627 of 1946.)

1. (1900) I.L.R. 27 Cal. 455.

statements. The learned Judge's argument is that the information was collected with a view to taking action under section 190 (1) (c) of the Code of Criminal Procedure and that no evidence could be recorded unless the requisite intimation had been given under section 191 of the Code of Criminal Procedure to the accused that he was entitled to have the case tried by another Court. *Haricharan Singh* v. *Emperor*[1] is a case where the person examined was the accused and perhaps the case may be distinguishable on that ground, but I do not consider it necessary to decide this point as I agree with the finding of the learned Judge that it is not expedient in the interests of justice to make a complaint against the respondents.

The revision petitions are dismissed.

V.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Oomayyan *alias* Muthiah Thevan .. *Accused.**

Criminal trial—Deaf and dumb accused—Conviction under section 379 of the Indian Penal Code based upon the pointing out by the accused of stolen property to the police by signs and admission of the offence by signs in Court—Propriety.

Where a conviction of a deaf and dumb accused under section 379 of the Indian Penal Code was based upon his having pointed out the stolen property to the police by signs and admitted the offence by signs in Court, and the case was submitted to High Court under section 341, Criminal Procedure Code,

Held, in the case of such a person, it was not safe to act on mere gestures either to infer that he was the thief or to hold that he admitted the offence in Court.

Case referred for the orders of the High Court under section 341 of the Code of Criminal Procedure by the Stationary Sub-Magistrate of Uttamapalayam in his letter, dated 25th September, 1946.

Accused not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The accused has been convicted under section 379 of the Indian Penal Code by the Sub-Magistrate of Uttamapalayam and under section 341 of the Code of Criminal Procedure the case has been submitted to this Court as the accused is a deaf and dumb person and was as such unable to understand the proceedings. The conviction is based upon the finding that the accused, by signs, admitted the offence in Court and that before the police he had also by signs pointed out the stolen property. It is not easy to see how even with the help of the brother of the accused who is said to have helped the Court in interpreting the Court's proceedings to the accused, it was possible to come to the conclusion that the accused admitted all the ingredients required to constitute an offence under section 379 of the Indian Penal Code in an unequivocal manner. Even with regard to the pointing out of the stolen property it would only be by gestures which could conceivably admit of theories other than that he himself had stolen the property or concealed it there with the knowledge that it was stolen. In the case of a person of this description I do not consider it safe to act on mere gestures of this kind either to infer that he was the thief or to hold that he admitted the offence in Court. The conviction is set aside and the accused is directed to be set at liberty forthwith.

V.S. *Conviction set aside.*

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1. (1900) I.L.R. 27 Cal. 455.

* Cr. R.C. No. 1080 of 1946. (Case Referred No. 40 of 1946.) 27th February, 1947.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR., JUSTICE YAHYA ALI.

K. Subba Rao .. *Petitioner.**

Madras District Municipalities Act (V of 1920), sections 199 and 317 (o)—Construction or re-construction of a building without express permission—When offence.

Under section 199 of the Madras District Municipalities Act, a construction or re-construction of a building should not be begun unless and until the executive authority has granted permission for the execution of the work. Section 201 requires that within 30 days after the receipt of an application for permission to construct or re-construct a building the executive authority should either grant the same or refuse it on one or more of the grounds mentioned in section 203. Under section 202 the applicant is entitled if permission has not been granted within the 30 days mentioned in section 201 to make a written request to the council and on receiving such a request the council is bound to determine by written order whether such approval or permission should be given or not. The applicant has after putting in the written request to the council to wait for one month longer to give time to the council to make the decision; but after the expiry of that one month, such approval or permission would be deemed to have been given if the council has not within one month determined whether such approval or permission should be given or not, and in such a case the applicant is entitled to proceed to execute the work. But even then he should do so without contravening the provisions of the Act or any by-laws made under the Act. Reading sections 197, 199, 201 and 202 together, it is clear that the applicant cannot carry out or complete any construction or re-construction of a building within at least a period of sixty days after the date of his application, and if he does so, he commits an offence under section 199 read with section 317 (o) of the Act.

Where the applicant did not make any written request at all to the Council and he did not even choose to wait for the period of sixty days, he will be guilty of an offence under section 317 (o) of the Act if he carries out the work without the express permission of the executive authority.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate, Vizagapatam, dated 2nd July, 1946, in C.A. No. 36 of 1946 preferred against the judgment of the Court of the Second Class Bench of Magistrates, Anakapalle, in B.C. No. 83 of 1946.

Kasturi Sivaprasada Rao for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner who is an Advocate practising at Vizagapatam has been convicted by the Bench Court, Anakapalle, under section 199 read with section 317 (o) of the District Municipalities Act, 1920, and sentenced to pay a fine of Rs. 20, in default to simple imprisonment for one day. He appealed against the conviction and sentence to the Sub-Divisional Magistrate, Vizagapatam, who confirmed the conviction and sentence.

The case against him is that he carried out and completed certain repairs and improvements to his house in contravention of the provisions of the Act. The petitioner filed an application on the 1st October, 1945, for making some additions to his house, and some correspondence was going on between him and the executive authority for proper plans drawn to scale and for other information which was necessary for the disposal of the application. The petitioner, however, without waiting for the permission of the executive authority, carried out the improvements and completed the same by the 20th December, 1945. He must evidently have commenced the work before the expiry of 60 days from the date of the application. The question is whether this act amounts to an offence under section 199 read with section 317 (o) of the Act. Under section 199, a construction or re-construction of a building should not be begun unless and until the executive authority has granted permission for the execution of the work. Section 201 requires that

* Cr.R.C. No. 1110 of 1946. (Cr.R.P. No. 1063 of 1946.) 21st February, 1947.

within 30 days after the receipt of an application for permission to construct or re-construct a building the executive authority should either grant the same or refuse it on one or more of the grounds mentioned in section 203. Under section 202 the applicant is entitled, if permission has not been granted within the 30 days mentioned in section 201 to make a written request to the Council, and on receiving such a request the Council is bound to determine by written order whether such approval or permission should be given or not. The applicant has, after putting in the written request to the Council to wait for one month longer to give time to the Council to make the decision; but after the expiry of that one month, such approval or permission would be deemed to have been given if the Council has not within one month determined whether such approval or permission should be given or not, and in such a case the applicant is entitled to proceed to execute the work. But even then he should do so without contravening the provisions of the Act or any by-laws made under the Act. Reading sections 197, 199, 201, and 202 together, it is clear that the applicant cannot carry out or complete any construction or re-construction of a building within at least a period of 60 days after the date of the application, and if he does so, he commits an offence under section 199, read with section 317 (*c*) of the Act. It is, from the facts of this case, manifest that the applicant did not make any written request at all to the Council and he did not even choose to wait for the period of 60 days. Without making such a request to the Council, it is not open under the Act for any applicant for permission to construct or re-construct a building to carry out or complete the work without the express permission of the executive authority.

The conviction of the petitioner is right. I do not propose to interfere with the sentence as the petitioner, being an Advocate, must be presumed to be fully aware of the relevant provisions of the Act and there can be no excuse for his not complying with them and contravening the express directions contained in the Statute. The petition is dismissed.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Alagathorai Padayachi .. *Petitioner.**

Arms Act (XI of 1878), section 19 (i)—Failure to deposit gun pending receipt of renewal of expired license—Offence, if committed—Period of grace, if extends period of license or condones failure to deposit on expiry of license.

The license in respect of a gun expired on 31st December, 1945 and the license-holder had applied before that date for its renewal, but it was received only on the 5th February, 1946. As a month's period of grace was usually allowed during which the license-holder may keep the weapon though the renewed license was not received, the license-holder did not deposit his gun as required by the Arms Act. On a question whether in such circumstances an offence under section 19 (*i*) of the Arms Act was committed,

Held, that the period of grace was not intended to extend the period of the license, or, in any manner, to limit the scope of section 16 of the Arms Act. The weapon which is not covered by a license has to be deposited as soon as the license expires. Technically, therefore, an offence under section 19 (*i*) must be held to have been committed, but, in the circumstances, the sentence has to be very nominal.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Sub-Divisional First Class Magistrate of Ariyalur, dated 27th June, 1946, and passed in C.C. No. 35 of 1945.

K. C. Subramaniam for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

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* Cr.R.C. No. 1083 of 1946. (Cr.R.P. No. 988 of 1946.) 1st November, 1946.

The Court made the following

ORDER.—The petitioner has been convicted under section 19 (*i*) of the Indian Arms Act for failing to deposit a gun under the provisions of the said Act. The license expired on the 31st December, 1945 and it would appear that the petitioner had applied before that date for the renewal of the license; but the renewed license was not received until the 5th February, 1946. Usually a month's period of grace is allowed within which the license-holder may keep the weapon though the renewed license was not received. The petitioner's case is that he took advantage of the period of grace and kept the weapon in his possession without depositing it as required under the Arms Act. He fell ill on the 21st January, 1946 and recovered on the 17th February, but in the meantime, on the 5th February, the license had been renewed. The question to be considered is whether in these circumstances an offence under section 19 (*i*) of the Indian Arms Act has been committed. The period of grace is not intended to extend the period of the license, or, in any manner, to limit the scope of section 16 of the Indian Arms Act. The weapon which is not covered by the license has to be deposited as soon as the license expires. In this case it was liable to be renewed on 1st January, 1946, but the authorities may refrain from taking any action for such period as they may fix according to their own regulations. But that is not a statutory period and it is not open to the holder of the weapon either to claim it as a matter of right or to state that he is not bound to deposit the weapon after the expiry of the period of license. Technically, therefore, an offence under section 19 (*i*) must be held to have been committed in this case. But the circumstances show that the petitioner was deterred from fulfilling the requirements of the Arms Act in the matter of the deposit of the weapon, whose license had expired, on account of three considerations. The first is that he had applied for renewal in time, the second is that he in good faith thought that he was lawfully entitled to keep the weapon for a month even though no renewed license was received, and thirdly that he fell ill within that period and ultimately the license was received before he recovered from his illness. Having regard to those considerations the sentence has to be very nominal. The fine is reduced to Rs. 5 in default to one week's simple imprisonment. The excess fine will be refunded.

V.S. *Fine reduced.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KUPPUSWAMI AYYAR.

P. Kesanna .. *Petitioner**

v.

Boya Bala Gangappa and another .. *Respondents.*

Court-Fees Act (VII of 1870), section 7 (v) (d)—Value of the subject-matter of suit for possession of specific immoveable properties—Computation.

When a person is suing for a decree for possession of specific immoveable property, the court-fee must be paid on the market value of the land notwithstanding that it had formed part of an estate paying revenue to the Government. What the Court has to look at is the relief which the plaintiff seeks. Where he asks to be put in possession of immoveable property that has fallen to his share at a partition, the boundaries of which are indicated, the case falls under section 7 (*v*) (*d*) of the Court-Fees Act. In such circumstances he is not asking for a "share". He is asking the Court to give him possession of what has already fallen to him. It is only when he is seeking possession of property

* C.R.P. Nos. 204 and 205 of 1946. 6th January, 1947.

as a fractional share of a portion of an estate that the notification of the Madras Government of 1932 directing the assessment of court-fee at ten times the revenue on such lands would apply.

Godavarty Sundaramma v. *Godavarty Mangamma*, (1916) 34 M.L.J. 558; *Kandaswami Goundan* v. *Subbai Goundan*, (1923) 46 M.L.J. 845; *Viswanatha Aiyar* v. *Ramaswami Naidu*, S.A. No. 886 of 1917 and *Raghava Reddiar* v. *Krishna Reddiar*, S.A. No. 711 of 1915, approved.

Subramania Aiyar v. *Rama Aiyar*, (1927) 54 M.L.J. 67, overruled.

Petitions under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the orders of the Court of the District Munsif of Bellary, dated 2nd November, 1945 and made in I.A. Nos. 681 and 682 of 1945 in O.S. Nos. 197 and 198 of 1945 respectively.

P. Chandra Reddi and *O. Chinnappa Reddi* for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *K. Subba Rao* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The respondents and their brother, Pedda Gangappa, were members of a joint Hindu family. The family became divided in 1918 and, according to the respondents, the lands forming the joint estate were divided between the brothers. Pedda Gangappa died in 1933. These petitions arise out of suits filed by the respondents in the Court of the District Munsif of Bellary to recover the properties which had been allotted to them at the partition. Each alleged that he had been given possession of his share but had been dispossessed by the petitioner, an alienee from the widow of Pedda Gangappa. The reliefs sought were valued at ten times the land revenue which was payable. The petitioner contended that the respondents were bound in law to value the reliefs asked for in accordance with the market values of the properties claimed by them and consequently he asked the District Munsif to appoint a Commissioner to ascertain the market values. The respondents objected. They said that by reason of the decision of this Court in *Subramania Aiyar* v. *Rama Aiyar*[1], they could only be compelled to pay court-fees on the basis of the land revenue paid by them. The District Munsif accepted this contention notwithstanding that there were several decisions of this Court to the contrary. The petitioner now asks this Court to revise the District Munsif's orders. The petitions have been placed before a Full Bench because of the conflict of authority.

Section 7 (*v*) (*d*) of the Court-Fees Act says that in suits for the possession of land, houses and gardens the court-fee shall be according to the value of the subject-matter and where the land forms part of an estate paying revenue to Government, but is not a definite share of the estate and is not separately assessed, the value shall be deemed to be the market value of the land. By a notification issued by the Governor-General in Council on the 10th September, 1889, it was provided that, when a part of an estate paying annual revenue to the Government under a settlement which is not permanent is recorded in the Collector's register as separately assessed with such revenue, the value of the subject-matter of a suit for the possession of a fractional share of that part shall, for the purposes of the computation of the court-fee chargeable in the suit, be deemed not to exceed five times such portion of the revenue separately assessed on that part as may be rateably payable in respect of the share. On the 10th September, 1921, the Provincial Government issued a notification embodying a similar provision, but in 1932 it directed that the court-fee should be assessed at ten times the revenue instead of five times.

Until the decision in *Subramania Ayyar* v. *Rama Aiyar*[1], this Court had consistently held that, when a person is suing, for a decree for possession of

1. (1927) 54 M.L.J. 67.

specific immoveable property, the court-fee must be paid on the market value of the land notwithstanding that it had formed part of an estate paying revenue to the Government. See *Godavarty Sundaramma* v. *Godavarty Mangamma*[1], *Kandaswami Goundan* v. *Subbai Goundan*[2], *Viswanatha Aiyar* v. *Ramaswami Naidu*[3] and *Raghava Reddiar* v. *Krishna Reddiar*[4]. The judgment in *Subramania Aiyar* v. *Rama Aiyar*[5] was delivered by Ramesam, J., sitting with Cornish, J. It was there held that the notification of the 10th September, 1921, covered a case where the plaintiff was suing for the recovery of possession of a specified immoveable property which had formed part of an estate. The Court was of the opinion that the words "fractional share" in the notification covered both a definite fraction and also an indefinite fraction. In other words the learned Judges considered that the deciding factor was whether the land had formed part of an estate paying revenue to the Government. This decision not only conflicts with the previous decisions of this Court but also is in conflict with three decisions of the Allahabad High Court, *Reference under the Court-Fees Act,* 1870, *section* 5[6], *Chandhan* v. *Bishan Singh*[7] and *Randhir Singh* v. *Randhir Singh*[8]. The only reported case in which it has been referred to with approval is *Kuljas Rai* v. *Pala Singh*[9] but the facts there were different.

In our judgment the correct opinion was expressed in the cases decided by this Court. What the Court has to look at is the relief which the plaintiff seeks. If he is asking to be put in possession of immoveable property the boundaries of which are indicated, as here, the case falls under section 7 (*v*) (*d*) of the Court-Fees Act. In such circumstances he is not asking for a "share." He is asking the Court to give him possession of what has already fallen to him. It is only when he is seeking possession of property as a fractional share of a portion of an estate that the notification applies. The decision in *Subramania Aiyar* v. *Rama Aiyar*[5] must be overruled.

The result is that the petitions are allowed and the cases will be remanded to the District Munsif to inquire into the question of the market values of the respective properties. If it turns out that the values are within his pecuniary jurisdiction he will require the plaints to be stamped accordingly and he will then proceed to try the suits. If the values exceed his pecuniary jurisdiction, he will return the plaints for presentation to the proper Court.

The petitioner is entitled to his costs.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Minor Kandaswami Pillai and another .. *Petitioners**

v.

T. N. C. Kandaswami Pillai and others .. *Respondents.*

Provincial Insolvency Act (V of 1920), section 28 (7)—Relation back of order of adjudication—Scope and effect—Annulment of adjudication of Hindu father—Rights of sons born after petition for adjudication and before annulment—Order directing the properties to continue to vest in the Official Receiver—Effect.

On 18th April, 1933, a petition was filed to adjudicate *X* (a Hindu debtor) an insolvent and he was adjudged insolvent on 1st November, 1934. On 8th March, 1940, the adjudication was annulled, because the insolvent had not applied for a discharge within the time allowed; but at the same time the Court passed an order directing that the property should continue to

1. (1916) 34 M.L.J. 558.
2. (1923) 46 M.L.J. 345.
3. S.A. No. 886 of 1917.
4. S.A. No. 711 of 1915.
5. (1927) 54 M.L.J. 67.
6. (1894) I.L.R. 16 All. 498.
7. (1911) I.L.R. 33 All. 680.
8. I.L.R. (1937) All. 128.
9. A.I.R. 1945 Lah. 15.

*C.R.P. No. 784 of 1945. 10th January, 1947.

vest in the Official Receiver; *Y* and *Z* the sons of *X* born in April, 1934, and May, 1939, respectively, filed a petition in 1944 for permission to sue *in forma pauperis* to have the sale of their shares in the properties sold by the Official Receiver in 1939 and 1942 set aside.

Held: The effect of section 28 (7) of the Provincial Insolvency Act is that the adjudication must be deemed to have taken place on 18th April, 1933, and that from that date the property vested in the Official Receiver and the property passed out of the hands of the insolvent before either of his sons *Y* or *Z* were born and they were in no better position with regard to the property than they would have been with regard to alienations made before they were born.

As simultaneously with the order of annulment of adjudication there was an order continuing the vesting of the property in the Official Receiver, the property continued to vest throughout in the Official Receiver and there was no reverter to the insolvent to confer any rights on *Y* or *Z* at any time.

Accordingly the petition for permission to sue *in forma pauperis* must be dismissed on the ground that the draft plaint disclosed no cause of action.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Tinnevelly, dated 22nd February, in O.P. No. 37 of 1944.

S. V. Venugopalachari for Petitioners.

A. Swaminatha Aiyar, T. R. Srinivasan, A. K. Annaswami Aiyar, K. Venkateswara Aiyar and *R. Sundaralingam* for Respondents.

The Court delivered the following

JUDGMENT.—On 18th April, 1933, I.P. No. 27 of 1933 was filed to adjudicate the father of the petitioners herein an insolvent; and he was adjudged an insolvent on the 1st November, 1934. On the 8th March, 1940, the adjudication was annulled, because the insolvent had not applied for discharge within the time allowed; but at the same time the Court passed an order directing that the property should continue to vest in the Official Receiver. The first petitioner was born in April, 1934, and the second petitioner in May, 1939. They filed O.P. No. 37 of 1944 for permission to sue *in forma pauperis* to have the sale of their shares in the properties sold by the Official Receiver in 1939 and 1942 set aside. The learned Subordinate Judge dismissed the petition on the ground that the allegations contained in the draft plaint showed no cause of action.

It is argued here that as far as the first petitioner was concerned, he was born before his father was adjudicated an insolvent and so was entitled to share in the family properties as soon as he was born. It is further argued that in any event on the 8th March, 1940, when the adjudication was annulled, the petitioners acquired a right to the properties, which were family properties, and were therefore entitled to maintain a suit to have the alienation set aside.

With regard to the first point there is no doubt that the learned Subordinate Judge was right. Section 28 (7) of the Provincial Insolvency Act states,

"An order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made."

It is argued that this has application only to certain aspects of the insolvency, though what aspects has not been stated. I find no reason for qualifying the application of section 28 (7), in the manner suggested; and the effect of this sub-section is that the adjudication must be deemed to have taken place on 18th April, 1933, and that from that date the property therefore vested in the Official Receiver. That means that the property passed out of the hands of the insolvent before either of the petitioners was born; and they are in no better position with regard to that property than they would have been with regard to alienations made before they were born.

The argument of the learned Advocate for the petitioners with regard to the effect of the annulment of the adjudication on 8th March, 1940, is that it revested the properties in the insolvent, although the Official Receiver continued to administer the property from that date for the purpose of satisfying the debts of the creditors; and it is argued on the authority of *Suryanarayanamurthi* v. *Veerraju*[1] that the property reverted to the insolvent as family property. The learned Advocate relies on this dictum of Patanjali Sastri, J., in that case,

"It is not, in our opinion, correct to say that an insolvent coparcener's share ceases to be joint family property while it is vested in the Official Assignee merely because the other coparceners lose their right of survivorship or because it is not divested from the Official Assignee on the insolvent's death."

From this it is argued that when the petitioners were born, they acquired an interest in the family property which they were entitled to enforce after the adjudication was annulled. I am unable to accept this reasoning; because in the case above cited and other cases relied on by the learned Advocate for the petitioners, the learned Judges were concerned with the effect of a reverter to the insolvent upon his adjudication being annulled. In this case there was no reverter to the insolvent. Simultaneously with the order of annulment of the adjudication, there was an order continuing the vesting of the property in the Official Receiver. The effect of the vesting was to make him the legal owner of the property, although he could not do what he liked with it, but had to dispose of it in accordance with the directions of the Insolvency Court. If he was the legal owner of the property, then the insolvent at no time had any legal interest in the property after 18th April, 1933, and the two petitioners could at no time have acquired any right to the property. At all the relevant dates the property was the property of the Official Receiver.

In this view the learned Subordinate Judge rightly dismissed the application of the petitioners.

The petition is dismissed with costs.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

A. K. Ramakrishna Ayyar .. *Petitioner**

v.

P. Bargavi Amma and others .. *Respondents.*

Mortgage—Usufructuary mortgage—Lease back—Construction—Lease with provision for surrender of possession at the end of one year—Provision for payment of rent "every season and for payment of interest on arrears—Clause making lessees and their equity of redemption and other properties liable for balance of rent and interest—Charge—If created only for the first year or also subsequent years when there was holding over.

A mortgagor executed a rental agreement in favour of his usufructuary mortgagee for a period of one year from the 30th Makaram 1111. The rent payable was calculated to be Rs. 28. The deed contained a sentence:—"This sum of Rs. 28 shall be paid for the year 1111 onwards every season before the 30th Makaram and your receipt obtained therefor; and if the arrears of rent are allowed they shall be paid with interest at 12 per cent. per annum." There was a provision that "we shall surrender possession at our own expense after the 30th Makaram 1112." Then followed a sentence which imposed a charge in these words:— "For the balance of rent and interest, the equity of redemption over and above the mortgage for Rs. 1,165, our other properties and ourselves are liable and we agree to your taking surrender of the properties".

On a question as to the nature of the lease and extent of the charge created,

Held: The rental agreement is for a period of one year and not for an indefinite period. *Kressa Menon* v. *Abdul Rahman*, (1926) 51 M.L.J. 378, distinguished. But that does not have the effect of restricting the charge to the rent due during the year of lease. By virtue of the clause in the deed, "For the balance of rent and interest......our other pro-

1. (1945) 1 M.L.J. 292.

* C.R.P. No. 985 of 1945. 24th October, 1946.

perties and ourselves are liable....", the charge would extend to the whole of the rent due, in the event of the tenants remaining in possession beyond the year of lease.

Gnanadesikam Pillai v. *Boopalarayar*, (1934) 67 M.L.J. 455: I.L.R. 58 Mad. 75; *Kutti Umma* v. *Madhava Menon*, (1901) 11 M.L.J. 186; *Rama Vadhyar* v. *Krishna Nair*, (1925) 93 I.C. 20 and *Mamambath Pettiyeth* v. *Cheria Uthalamma*, (1912) 16 I.C. 560, distinguished.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Ottapalam, dated 31st March, 1945, in S.C.S. No. 142 of 1943.

C. K. Viswanatha Aiyar for Petitioner.

C. S. Swaminathan for Respondents.

The Court delivered the following

JUDGMENT.—The rental agreement was executed by the respondents in favour of the petitioner for a period of one year from the 30th Makaram 1111. The particulars of the pattom were set out, and the rent payable calculated to be Rs. 28. The deed then contains this important sentence:

"This sum of Rs. 28 shall be paid for the year 1111 onwards every season before the 30th Makaram and your receipt obtained therefor; and if the arrears of rent are allowed they shall be paid with interest at 12 per cent. per annum."

This sentence is relied upon by the petitioner as indicating that the lease was not merely for one year as stated earlier in the document but for an unlimited period. This sentence is however followed by one roughly to this purport:

"We shall surrender possession at our own expense after the 30th Makaram 1112."

Then comes a sentence which imposes a charge and is in these words:

"For the balance of rent and interest, the equity of redemption over and above the mortgage for Rs. 1,165, our other properties and ourselves are liable and we agree to your taking surrender of the properties."

The question is whether this sentence creates a charge for the arrears of rent only for the year which is stated in the early part of the document to be the period of the lease or also for the subsequent years during which the respondents remained in possession. The lower Court purporting to follow *Gnanadesikam Pillai* v. *Boopalarayar*[1] held that there was no charge beyond the period of the lease and that the suit was therefore barred by limitation altogether, as the suit claim did not relate to any period within three years of the filing of the suit.

Gnanadesikam Pillai v. *Boopalarayar*[1] was largely a decision on the particular facts of that case as they appeared from a study of the two relevant documents. Reference is however made therein to *Kutti Umma* v. *Madhava Menon*[2]. The learned advocate for the respondents relies also on the two other cases in which it was held that when a document creates a charge, the charge is only for the rent due during the period of the lease. They are *Rama Vadhyar* v. *Krishna Nair*[3] and *Mamambath Pettiyeth* v. *Cheria Uthalamma*[4], following *Kutti Umma* v. *Madhava Menon*[2]. The *ratio decidendi* was that after the expiry of the term of the lease, the tenant was only holding over and was not in possession and owing rent under the lease. The rent was then due under an oral contract implied by the conduct of the tenant in tendering rent and of the landlord in accepting it. The rent was therefore not due under a registered document and no charge could therefore be created.

I agree with the learned Advocate for the respondents that Ex. P-8, the rental agreement, is for a period of one year and not for an indefinite period. On the face of it, the document states that it is for a period of one year and near the end of the document we find the sentence already set out, *viz.*, "We

1. (1934) 67 M.L.J. 455: I.L.R. 58 Mad. 75.
2. (1901) 11 M.L.J. 186.
3. (1925) 93 I.C. 20.
4. (1912) 16 I.C. 560.

shall surrender possession at our own expense after the 30th Makaram 1112" This case therefore differs from that in *Erassa Menon* v. *Abdul Rahiman*[1], in which the learned Judges found upon a reading of the document as a whole, that despite the initial recital that the lease was for one year, it was really for an indefinite period. The sentence, "This sum of Rs. 28 shall be paid from the year 1111 onwards every season before the 30th Makaram........". seems merely to make provision for the possibility that after the year had expired the tenant would continue on the same terms and does not have the effect of extending the period of the lease beyond one year. I do not however think that this interpretation would have the effect of restricting the charge to the rent due during the year of lease. The documents referred to in the cases relied on by the respondents do not contain a sentence of this kind, "For the balance of rent and interest........our other properties and ourselves are liable.........." This sentence refers to the total amount of rent referred to in "This sum of Rs. 28 shall be paid from the year 1111 onwards every season"; and so on a plain reading of the document this charge would extend to the whole of the rent due, in the event of the tenants remaining in possession beyond the year of lease. That means that the petitioner's claim is not barred by limitation.

The petition is allowed and the suit in the lower Court decreed as prayed for. The petitioner is entitled to his costs in both the Courts.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

M. Abdul Wahid Sahib .. *Petitioner**

v.

Dewanjee Abdul Khader Sahib .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 12—Appellate authority appointed by Government notification—If persona designata or Court—Application for transfer of appeal before that authority—Maintainability—Civil Procedure Code (V of 1908), section 24.

On the questions whether under section 12 of the Madras Buildings (Lease and Rent Control) Act (XV of 1946) a person appointed by notification of the Government to act as an appellate authority to hear objections against orders passed by the Rent Controller functions as a *persona designata* and not as a Court subordinate to the High Court and as such whether an application for transfer of an appeal before such authority would be maintainable,

Held, that from the language of section 12 it seems clear that the District and Subordinate Judges mentioned by the notification are appointed *persona designata* and not as Courts. Hence an application under section 24, Civil Procedure Code, for transfer of an appeal before such appellate authority would not be maintainable.

H. A. Aris Kiliyoboy, (1926) I.L.R. 4 Rang. 304 (F.B.) and *Kiron Chandra* v. *Kalidas Chatterjee*, A.I.R. 1943 Cal. 247 referred to.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to direct the transfer of C.M.A. No. 18 of 1946 from the file of the District Court, Bellary, to that of any other District Court.

Kasturi Sivaprasada Rao for Petitioner.

B. V. Ramanarasu for Respondent.

The Court made the following

ORDER.—This is an application under section 24 of the Code of Civil Procedure to transfer C.M.A. No. 18 of 1946 on the file of the District Court of Bellary to some other District Court in the Province. An objection has been raised *in limine* by the respondent that the application is not maintainable as in functioning as an appellate authority in the matter in question the District Judge of Bellary is a *persona designata* and not a Court which is subordinate

1. (1926) 51 M.L.J. 378.
*C.M.P. No. 18 of 1947. 25th February, 1947.

to this Court, and that consequently no application for the transfer of appeal before such authority can be maintained in this Court. The Madras Buildings (Lease and Rent Control) Act (XV of 1946) regulates the letting of residential and non-residential buildings, and control of leases of such buildings. Under that Act a Controller is appointed who has been invested with certain powers. A right of appeal has been given against some orders passed by him under section 12 of the Act. That section empowers the Provincial Government by general or special order notified in the official Gazette to confer on such officers and authorities as they may deem fit, the powers of appellate authorities for the purpose of the Act in such areas or in such classes of cases as may be specified in the order. The remaining sub-sections of section 12 embody a special procedure that is prescribed with regard to such appeals. Under clause (b), sub-section (1), an appeal may be filed by any person aggrieved by an order passed by the Controller within 15 days. Under sub-section (2) that appellate authority may order stay of further proceedings in the matter pending decision on the appeal. Under sub-section (3) the appellate authority is given powers to send for the records of the case from the Controller, and after giving the parties an opportunity of being heard and, if necessary, after making such further enquiry as he thinks fit either *personally* or through the Controller, to decide the appeal. In exercise of the power vested under this section the Provincial Government issued an order on the 11th November, 1946, which is notified in Fort St. George Gazette, dated the 19th November, 1946, conferring on the District Judge of Bellary, *inter alia* the powers of an appellate authority for the purpose of the Act in respect of cases arising in the District of Bellary. Likewise powers have been conferred on all the District Judges and some of the Subordinate Judges in the Presidency in respect of cases arising in their respective jurisdictions. The question is whether having regard to the provisions of section 12 of the Act and the language of the Notification mentioned above, the District Judge in functioning as an appellate authority is a *persona designata* or a Court subordinate to this Court. There have been various decisions bearing upon this point. The test to be applied in such cases is whether the appointment of the authority was in his personal capacity or as a Court. From the language of section 12 it seems clear that the District Judges and the Subordinate Judges mentioned in the Notification were appointed as *persona designata* and not as Courts. The procedure which is required for the purposes of the appeal has been embodied in section 12, which would have been wholly unnecessary if the appellate authority was to function as a Court, in which case the provisions of the Code of Civil Procedure would be automatically applicable. I may refer to two decisions throwing considerable light upon this matter. *H. A. Aziz* v. *Kilyoboy*[1] and *Kiron Chandra* v. *Kalidas Chatterjee*[2]. The preliminary objection raised by the respondent is upheld and the petition is dismissed.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE GOVINDARAJACHARI.

Ayisha Bi Bi .. *Petitioner**

v.

Muhammad Sadakathulla Marcair and others .. *Respondents.*

Madras Civil Courts Act (III of 1873), sections 12 and 13—Suit filed in District Munsif's Court—Valuation in plaint—Forum of appeal—Subject-matter of suit shown to be of higher value—Appeal direct to High Court—Sustainability.

The effect of Ss. 12 and 13 of the Madras Civil Courts Act is that when a suit is entertained by the District Munsif's Court, on the basis of its own valuation, that valuation

1. (1926) I.L.R. 4 Rang. 304 (F.B.). 2. A.I.R. 1943 Cal. 247.

* C.R.P. No. 886 of 1946
A.A.O. No. 209 of 1946 and
C.M.P. No. 1585 of 1946.

28th November, 1946.

will determine the forum of the appeal and nothing in section 13 of that Act will justify the entertainment of an appeal by the High Court from the decision of the District Munsif's Court, even though on a correct valuation the suit should have been tried by the Court of the Subordinate Judge and the appeal should have been laid to the High Court. In such cases the valuation of the suit determines the forum of appeal unless and until the plaint has been amended.

Kannayya Chetti v. *Venkatanarasayya*, (1916) 32 M.L.J. 221: I.L.R. 40 Mad. 1 (F.B.), relied on.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Cuddalore, dated 11th January, 1946, in A.S. No. 48 of 1945, preferred against the decree of the Court of the District Munsif, Cuddalore, in O.S. No. 391 of 1942, etc.

T. E. Ramabhadrachariar for Petitioner.

K. S. Ramamurthi and *K. Srinivasan* for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—All these three matters arise out of an order in appeal from the decision in O.S. No. 391 of 1942 on the file of the District Munsif's Court, Cuddalore, which was a suit for partition and possession of the share of the widow in the estate of one Khadirsa Maracair. The total value of the estate was approximately Rs. 41,000, in which the plaintiff's share was just under Rs. 3,000. The plaintiff valued the suit for purposes of jurisdiction at Rs. 2,979-10-2, treating it as a suit for partition. The suit was decreed in part and an appeal was preferred to the District Court of South Arcot, but was transferred to the Court of the Subordinate Judge, Cuddalore. The respondents took a preliminary objection that the suit filed as a suit for partition was, in substance, a suit for administration of the estate of the deceased Khadirsa Maracair and should have been valued on the total value of the estate. Accepting this contention and relying on the decision of King, J., in *Khadir Husain Rowther* v. *Jamila Bibi*[1], the learned Subordinate Judge held that the only Court which could hear the appeal is the High Court. The memorandum of appeal was therefore returned for presentation to the proper Court. Against this order, C.M.A. No. 209 of 1946 and, in the alternative, C.R.P. No. 336 of 1946 have been preferred. The connected C.M.P. No. 1585 of 1946 has been filed by way of abundant caution, praying that in case the High Court holds that the appeal lies to this Court, the delay may be excused and the memorandum of appeal may be received.

It is now conceded that no appeal lies against an order returning the memorandum of appeal and that the correctness of the lower appellate Court's order can only be canvassed in the civil revision petition. Section 12 of the Madras Civil Courts Act provides that the jurisdiction of a District Munsif extends to "all like suits not otherwise exempted from his cognizance, of which the amount or value of the subject-matter does not exceed Rs. 3,000." Section 13 of that Act provides that appeals from the decrees and orders of the Subordinate Judges and District Munsifs shall, when such appeals are allowed by law, lie to the District Court, except when the amount or value of the subject-matter of the suit exceeds Rs. 5,000, in which case the appeal shall lie to the High Court. For the petitioner it is contended that the provisions of section 13 has to be read along with the provisions of section 12 of the Act and that section 13 does not contemplate an appeal to the High Court from a decree of the District Munsif's Court even though on a proper valuation of the suit tried by the District Munsif's Court, the subject-matter thereof would exceed Rs. 3,000. On the other hand, the respondent contends that the combination of the provisions regarding appeals from decrees of Subordinate Judges and appeals from decrees of District Munsifs into a single clause providing that such appeals shall lie to the District Court except when the value of the subject-

1. (1942) 2 M.L.J. 537.

matter exceeds Rs. 5,000, in which case the appeals should lie to the High Court, clearly contemplates the contingency of a decree by the District Munsif in a suit, the subject-matter of which exceeds the proper jurisdiction of that Court and in such a case if the subject-matter is more than Rs. 5,000 under the plain provisions of section 13, the appeal must lie to the High Court.

In this connection, the provisions of section 11 of the Suits Valuation Act are important. Sub-section 1 of that section provides that

"an objection that by reason of the over-valuation or under-valuation of suit or appeal, a Court of first instance or lower appellate Court which had no jurisdiction with respect to the suit or appeal, exercised jurisdiction with respect thereto, shall not be entertained by an appellate Court, unless—

(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, or

(b) the appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits."

Sub-section 2 provides that,

"if the objection was taken in the manner mentioned in clause (a) of sub-section 1 but the appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower appellate Court."

Now, turning to the facts of the present case, it does not appear that there was any objection to the valuation of the suit in the trial Court. Objection was raised for the first time in the lower appellate Court, and it is contended for the petitioner that under such circumstances it was the duty of the appellate Court to proceed with the hearing of the appeal as if the trial Court had jurisdiction to entertain the suit, with the consequence that the appeal would lie to the Court which would have had jurisdiction on the basis of the valuation in the plaint. The petitioner relies strongly on the decision in *Kannayya Chetti* v. *Venkatanarasayya*[1]. That was a case in which the District Munsif in a suit for accounts, the plaint of which valued the relief at less than Rs. 3,000, passed a decree for more than Rs. 5,000, and it was held that under section 13 of the Madras Civil Courts Act the appeal from the District Munsif's decree lay to the District Court and not to the High Court. In the order of reference the learned Judges point out that in every case where the Court is seized of jurisdiction it cannot and does not lose it by any change in the value of the subject-matter of the suit after the institution of the suit or by the precise ascertainment of its value in cases which do not admit of such ascertainment at the time of institution, except when the plaint is allowed to be amended. In dealing with the question of the forum of appeal, they say,

"We think that the same simple rule should be applied, namely, that the amount or value of the subject-matter as fixed in the plaint should determine the Court to which the appeal lies. It is to be observed that the words 'amount or value of the subject-matter of the suit' occur both in sections 12 and 13 of the Civil Courts Act and the words should be given the same meaning in both the sections in the absence of any indication either from the context or otherwise that they were used in different senses."

The learned Judges quote the dictum of Sir V. Bhashyam Aiyangar, J., in *Krishnamachariar* v. *Mangammal*[2] that the theory of an appeal is that the suit is continued in the Court of Appeal and reheard there. They point out that the provision in the Court-Fees Act for the levying of additional fees on the plaint when the suit comes before the Court of Appeal if that Court finds the suit has been under-valued, is based on the assumption that the value of the suit is the same in the original Court and in the Court of Appeal. They therefore conclude that reading sections 12 and 13 of the Madras Civil Courts Act together there can be no doubt that appeals from decrees of the District Munsifs

1. (1916) 32 M.L.J. 221: I.L.R. 40 Mad. 1 (F.B.).
2. (1903) I.L.R. 26 Mad. 91.

lie only to the District Court and that the amount or value of the subject-matter of the suit, whether in the Court of Appeal or in the trial Court, is the amount as fixed in the plaint. This view was accepted by the Full Bench and it is contended that on the authority of this case the fact that in the trial Court the suit was valued on a wrong basis so as to give jurisdiction to the District Munsif in a matter which should have been taken only by higher Court, will not alter the jurisdiction in appeal which will proceed on the footing of the valuation in the plaint. In *Kelu Achan* v. *Cheriya Parvathi Nethiar*[1], the question was whether by reason of the under-valuation of the suit which was instituted in the District Munsiff's Court, though it should have been valued at more than Rs. 5,000 and instituted in the Court of the Subordinate Judge, the fact that the party was thereby deprived of the right of first appeal on facts to the High Court which was dealing with the matter in second appeal, can be deemed to affect prejudicially the disposal of the suit or appeal on the merits so as to fall within the terms of section 11, sub-section 2 of the Suits Valuation Act and to require the retrial of the suit by the proper Court. The decision of the Full Bench was that there was no such prejudice. It seems clear that this decision proceeds on the assumption that the erroneous value of the subject-matter of the suit as fixed in the plaint will determine the forum of appeal. Schwabe, C.J., states :

> "There is ample authority of this Court that the lower appellate Court in such a case not only has jurisdiction to hear the appeal from a District Munsiff who has exceeded his jurisdiction but that it must do so unless it is satisfied, as required by section 11 of the Suits Valuation Act, first, that the point was taken, and secondly, that the decision on the merits was prejudicially affected."

Coutts-Trotter, J., as he then was, states :

> "I take it that the object of section 11 of the Suits Valuation Act is to provide a machinery for curing the original lack of jurisdiction in such circumstances. If it does not do that, it does nothing else; yet, it is argued before us that, if you once start a suit in one Court which decides on the merits, the section has no power to cure the original lack of jurisdiction which remains uncured to the end; that is to say, that the section gives you something with one hand and immediately takes it away with the other . . . . . It seems to me to follow from that, beyond a possibility of question, that in sub-section 1 (b) when we get to talking about 'appellate Court', that means not the Court in which the appeal should have been started in the first instance, but the Court to which it did, in fact, go and ought to have gone if the lack of jurisdiction were to be condoned."

The other learned Judge agreed with this view. It seems to us quite clear that the learned Judges in this decision took the same view as that which is found in the order of reference in *Kannayya Chetti* v. *Venkatanarasayya*[2], namely, that, regarding sections 12 and 13 of the Madras Civil Courts Act together, when a suit is entertained by the District Munsiff's Court, on the basis of its own valuation, that valuation will determine the forum of the appeal and nothing in section 13 of that Act will justify the entertainment of an appeal by the High Court from the decision of the District Munsiff's Court, even though on a correct valuation the suit should have been tried by the Court of the Subordinate Judge and the appeal should have been laid to the High Court.

In the light of these two Full Bench decisions, it seems unnecessary to look for further authority. The respondent has quoted the decisions in *Vasudeva* v. *Madhava*[3] and *Jalladeen Marakayar* v. *Vijayasami*[4], both of which were anterior to the Full Bench decision in *Kannayya Chetti* v. *Venkatanarasayya*[2] and are not referred to in the judgment in that case. We do not think it is necessary to consider these decisions in detail, for the decision in the later Full Bench case binds us. It has, however, been pointed out that in *Raghavachariar* v. *Raghavachariar*[5], Muthuswami Aiyar, J., who was a party to the decision in *Vasudeva* v. *Madhava*[3] has taken a

1. (1923) 45 M.L.J. 135 : I.L.R. 46 Mad. 631 (F.B.).
2. (1916) 32 M.L.J. 221 : I.L.R. 40 Mad. 1 (F.B.).
3. (1892) I.L.R. 16 Mad. 326.
4. (1915) 29 M.L.J. 142 : I.L.R. 39 Mad. 447.
5. (1893) 26 M.L.J. 726.

different view. As to the decision of King, J., in *Khadir Hussain Rowther* v. *Jamila Bibi*[1], on which the learned Subordinate Judge has relied, the attention of the learned Judge does not appear to have been drawn to the Full Bench cases cited above. In *Bhujam Sriramulu Chetti*, In re[2], Happell, J., has followed the rule that the valuation of the suit in the plaint determines the forum of appeal unless and until the plaint has been amended. It seems to us that this is a salutary rule which has the great advantage of removing the uncertainty which would otherwise prevail as to the proper procedure, to the great detriment of the litigant public. We do not think it necessary to go into the decisions which the respondent has quoted under section 110 of the Code of Civil Procedure regarding the value of the subject-matter of the suit for purposes of appeal to the Privy Council. In this view we allow the civil revision petition with costs and remand the case to the Court of the Subordinate Judge, Cuddalore, for disposal on the merits.

C. M. A. No. 209 of 1946 and C. M. P. No. 1585 of 1946 are dismissed and there is no order as to the costs. The memorandum of appeal in S. R. No. 2565 of 1946 will be transmitted to the Court of the Subordinate Judge, Cuddalore.

B.V.V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Thirumalayandi Thevar .. *Petitioner**

v.

Uthanda Thevar .. *Respondent.*

Court-Fees Act (VII of 1870), section 7 (iv-A) (Mad.)—Setting aside sale deed—Prayer for declaration that deed was nominal and sham and for delivery of possession—Declaration whether a surplusage—Void and voidable documents—Applicability of section 7 (iv-A) and of Specific Relief Act (I of 1877), section 39.

A suit to set aside a sale of certain immoveable properties effected by a registered sale deed executed by the plaintiff in favour of the defendant praying for a declaration that the sale deed was a sham and nominal transaction and therefore never intended to be acted upon, and not valid in law, and for delivery of possession of the properties from defendant as consequential relief is governed by section 7 (*iv-A*) of the Court-Fees Act as the prayer for declaration is not a mere surplusage.

Case-law discussed.

Section 39 of the Specific Relief Act covers both void and voidable documents and section 7 (*iv-A*) of the Court-Fees Act is not confined to cancellation of voidable documents only. Even a plaint asking for cancellation of a document which is void *ab initio* for the reason that it is benami or sham or nominal would fall within the ambit of section 7 (*iv-A*).

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Tenkasi, dated 1st November, 1945 and made in O. S. No. 60 of 1945.

A. Swaminatha Aiyar for Petitioner.

G. R. Jagadisa Aiyar and the Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition raises the question of court-fee payable on the plaint brought by the petitioner herein in O. S. No. 60 of 1945 in the District Munsiff's Court, Tenkasi. The learned District Munsiff held that the relief prayed for by the plaintiff fell in substance under section 7 (iv-A) of the Court-Fees Act and that consequently court-fee should be paid on the actual market-value of the properties affected by the sale deed dated 16th December, 1942, in respect of which a declaration was asked for in the plaint. The petitioner's contention is that in view of the position taken by him that the said sale deed was a sham and nominal

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1. (1942) 2 M.L.J. 587. 2. (1945) 1 M.L.J. 162.

*C.R.P. No. 1502 of 1945. 27th Marh, 1946.

transaction and hence inoperative, the provisions of section 7 (iv-A) of the Court-Fees Act were not attracted. The question is which view is correct.

One Thirumalayandi Thevar was the owner of the plaint mentioned properties. He had two daughters Sundarathammal and Achi Ammal. The former had two sons, the plaintiff and his younger brother Vellaiyappa Thevar. The latter had one daughter Ramayee *alias* Ramathal. After the death of Thirumalayandi Thevar (senior), the property passed to the daughters and for the purpose of convenient enjoyment they seem to have divided it into two shares and enjoyed each her share separately. On the 13th May, 1940, Ramathal the daughter of Achi Ammal who was in possession of her mother's share executed a deed of settlement in favour of three persons. Vellaiyappa Thevar filed O. S. No. 6 of 1941, Sub-Court, Tinnevelly, to set aside the aforesaid deed of settlement executed by Ramathal as being invalid and inoperative. While that suit was under contemplation, a document of transfer was taken from the plaintiff of his half share in the properties which were in the possession of Achi Ammal's daughter. This transfer was found to be inoperative being a transfer of mere *spes successionis* and eventually a decree was passed in O. S. No. 6 of 1941 in favour of both the plaintiff therein Vellaiyappa Thevar and his elder brother the plaintiff in the present case. In this state of affairs, another transfer was executed by the plaintiff on 16th December, 1942, for Rs. 1,000 in favour of the defendant in the present action conveying to the latter the plaintiff's interest in the said property, *i.e.*, the share that was being enjoyed by Ramathal. It is to avoid that sale and to obtain a declaration that the same was sham and nominal and never intended to be acted upon and not valid in law that the present suit was instituted by the plaintiff. In paragraph 8 of the plaint it is urged that he executed the sale deed and had it registered, that he received no consideration whatever for the sale deed and that it was only a sham and nominal transaction. He explains that because the first sale dated 16th May, 1940, was executed for Rs. 1,000 the latter transfer of 16th December, 1942, was also executed for the same amount. Although the document recites that cash consideration was paid, the recital is not true and was made only for the sake of formality. It is further averred that the plaintiff did not receive from the defendant Rs. 600 for the expenses of O. S. No. 6 of 1941 or any amount for family expenses or for making jewels. He remained *ex parte* in the prior suit. In paragraph 9, again, it is said that the sale deed was not executed with the idea that it should be operative and take effect and that the defendant has not acquired any interest in the suit property through the said document. The following passage in that paragraph is significant :

"At the time of sale deed the properties were not in the possession of the plaintiff. Up to this date he has not got possession. The defendant had also no possession till the filing of the plaint."

In paragraph 11 the plaintiff states that the defendant was making

"terrible attempts for the past one month to establish his interest"

in the suit properties and then adds :

"If the sale deed executed by the plaintiff were allowed to remain with the defendant the plaintiff apprehends much injury".

Paragraph 11-A which seems to have been subsequently added says as follows :

"As the defendant had obtained delivery of possession of the properties through the Sub-Court, Tinnevelly the plaintiff has to get delivery of the said properties as a consequential relief. Though, in fact, the defendant had not obtained delivery of possession of the properties, yet as the records show that possession (symbolical possession) had been delivered to the defendant, the plaintiff in order to avoid unnecessary litigation in future has included that prayer."

Paragraph 12 says that the cause of action arose on 16th December, 1942, the date of the execution of the sale deed and November, 1944, when the defendant claimed interest in the suit property. The prayer is couched in these words in paragraph 15 :

"Therefore it is prayed that the Court may be pleased

(a) to declare the sale deed as regards the undermentioned properties executed on 16th December, 1942, by the plaintiff in favour of the defendant is a benami one, that it was a

sham and nominal transaction, that it was never intended to be acted upon and that it is not valid in law,

(b) to direct delivery of possession of the properties from the defendant to the plaintiff as a consequential relief,

(c) to decree that the costs of the suit may be paid by the defendant, and

(d) for such other reliefs".

The main contention of Mr. A. Swaminatha Ayyar for the petitioner is that the prayer for declaration with reference to the sale deed dated, 16th December, 1942, is superfluous and unnecessary and hence it is not essential for the plaintiff to get the sale deed cancelled or set aside for obtaining the relief regarding possession of the properties. The learned Government Pleader urged that in the plaint as framed, the main relief that is required is the declaration touching the sale in question and possession is asked for merely by way of caution and as an incidental or consequential relief. Numerous decisions have been cited on both sides. In view however of the existence in this case of two features in combination which appear to me to decisively negative the petitioner's contention, it may not be necessary to deal exhaustively with the long series of cases cited at the Bar. Those features are (1) that the plaintiff himself was a party to the sale deed which he now impugns as being sham, nominal and inoperative and (2) that he has expressly and specifically asked in the plaint for a declaration that the said deed of sale is for the reasons mentioned by him not valid in law. In none of the cases brought to my notice I find that both these features were together present. On that ground alone it will be sufficient to hold that this case is distinguishable from the various decisions relied upon by the petitioner.

Section 7 (iv-A) of the Madras Court-Fees Act is as follows :

"In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value, according to the value of the subject-matter of the suit and such value shall be deemed to be—

If the whole decree or other document is sought to be cancelled, the amount or value of the property for which the decree was passed or the other document executed.

If a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property".

Article 91 of the Limitation Act provides a period of three years for suits for the cancellation or setting aside of an instrument not otherwise provided for, commencing from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.

Section 39 of the Specific Relief Act also deals with the cancellation of documents and runs thus :

"Any person against whom a written instrument is void or voidable, who was reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled".

It is evidently having the language of this provision in view that the plaintiff stated in paragraph 11 of his plaint, as already mentioned, that if the sale deed executed by the plaintiff was allowed to remain with the defendant, the plaintiff apprehended much injury. It may be further noticed that section 39 of the Specific Relief Act covers both void and voidable documents and as contended by the learned Government Pleader section 7 (iv-A) of the Court-Fees Act is not by its language confined to cancellation of voidable documents only. Even a plaint asking for cancellation of a document which is void *ab initio* for the reason that it is benami or sham or nominal would fall within the ambit of section 7 (iv-A). It is for this reason that the learned advocate for the petitioner argued that even if he has asked expressly for the setting aside or cancellation of a document of this nature, such relief being really unnecessary and superfluous according to the various decisions on which he relied, the particular relief should be altogether ignored for court-fee purposes and the plaint should be stamped according to the valuation of the main relief sought by him apart from the relief concerning the nature of the document.

In *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[1] which was a suit by Hindu reversioners impeaching certain alienations made by the widow, the plaintiffs had specifically asked for a declaration that the ijara in dispute had become inoperative after a certain point of time and asked for possession on that basis. The question that arose before the Privy Council was whether upon such averments the period of limitation that applied was the one provided under Article 91 of Schedule I of the Limitation Act or the usual 12 years period provided by Article 141. It was held that it was unnecessary to ask for a declaration that the ijara was inoperative. This was in the view that a Hindu widow is not a tenant for life but the owner of her husband's property subject to certain restrictions as to alienation and subject to its devolving upon her husband's heirs upon her death. She is competent to alienate it subject to certain conditions although it is voidable at the election of the reversionary heir. A reversionary heir may either affirm it or treat it as a nullity without the intervention of any Court and if he has manifested his election by the overt act of commencing an action to recover possession of the property, there is no call upon the Court to cancel or set aside the alienation as a condition precedent to the right of action of the reversionary heir awarded to him under the personal law and it is open to him to ignore the alienation and sue straightaway for the recovery of the property. Their Lordships however stated this :

> "It is true that the appellants prayed by their plaint a declaration that the ijara was inoperative as against them, as leading up to their prayer for delivery to them of khas possession. But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances, which they relied on, for showing that the ijara or any derivative dealings with the property were not in fact voidable, but were binding on the reversionary heirs."

Eventually their Lordships held that the Article that was applicable was 141 and not 91.

In *Pethaperumal Chetty* v. *Muniyandi Servai*[2], again the question arose before the Judicial Committee whether Article 91 was the appropriate provision to apply or Article 141. The instrument in that case was alleged to have been brought into existence to defeat and defraud a creditor, and being benami was said to be inoperative in effect. The suit was to recover possession and there was no prayer for a declaration that the document was inoperative. The only objection raised was that as a preliminary to the relief for possession, the plaintiff had to set aside or cancel the document and that the suit would be barred under Article 91. It was held that it was unnecessary for the plaintiff to have it set aside as a preliminary to the obtaining of the relief that he claimed, since the deed had been held by the Courts in India as being inoperative and ineffective which finding their Lordships accepted as binding upon them. With reference to both these decisions, the point of distinction that is noticeable is that in both, the plaintiff was not a party to the impugned document and in *Pethaperumal Chetty* v. *Muniyandi Servai*[2], there was no declaration asked for that the document was inoperative. The document was merely ignored and possession was claimed. It must however be mentioned that although in *Pethaperumal Chetty* v. *Muniyandi Servai*[2], the plaintiff was not a party to the document that was questioned, he claimed that his brother was a party to the same.

In *Sangawa* v. *Huchan gowda*[3], which was a suit to recover possession of lands, a sale by the plaintiff's husband was impugned as a paper transaction not intended to be operative having been vitiated by misrepresentation and fraud. It was found that the sale that was attacked was an inoperative transaction and it did not require to be set aside before granting to the plaintiff the relief of possession. It was also held that Article 144 applied to the case. In this case also it has to be noticed that the plaintiff was not a party to the document sought to be set aside and there was no declaration asked for concerning the inoperative nature of the sale deed.

1. (1907) 17 M.L.J. 154 : L.R. 34 I.A. 87 : I.L.R. 34 Cal. 329 (P.C.).
2. (1908) 18 M.L.J. 277 : L.R. 35 I.A. 98 : I.L.R. 35 Cal. 551 (P.C.).
3. (1923) I.L.R. 48 Bom. 166.

In *Krishnaswami Aiyangar* v. *Kuppu Ammal*[1], decided by Curgenven, J., the relief claimed was a declaration of the plaintiff's title to certain property and an injunction to restrain the defendants from interfering with his possession. A settlement deed that had been executed by the plaintiff's maternal grandfather in favour of the grand-daughters was impugned as a mere fictitious or sham transaction contrived as a defence against a maintenance claim and no property was intended to pass thereunder. The learned Judge held that the plaintiff was not in those circumstances obliged to have the settlement set aside before becoming entitled to the other reliefs and that the appropriate provision of the Court-Fees Act to be applied was section 7 (iv) (*c*). Reference was made in this judgment *inter alia* to *Unni* v. *Kunchi Amma*[2], relating to recovery of property alienated by the karnavan of a Malabar tarwad and to the Privy Council decision in *Pethaperumal Chetty* v. *Muniyandi Servai*[3] already referred to and the latter was held to conclude the question. The decisions in *Sangawa* v. *Huchan gowda*[4] and *Swaminatha Ayyar* v. *Rukmini Ammal*[5] were also adverted to. The decision largely turned upon the question whether there was a real or actual transfer however voidable. If there was no real transfer but it was only a fictitious arrangement, it was not necessary to set it aside. If however the transfer was merely voidable, the learned Judge would have thought it necessary to get it set aside before giving any further relief. With regard to this case also it must be observed that the plaintiff was not a party to the transfer and there was no declaration asked for to set aside the deed that was questioned. All that was prayed for was a declaration of title to the property in suit.

In *Kattiya Pillai* v. *Ramaswamia Pillai*[6] there was a will executed by the plaintiff's father in favour of the plaintiff's brothers, defendants 1 and 2. The plaintiff sued expressly for a declaration that the will was a forgery and for its cancellation and also for the cancellation of the registration of the will by the Sub-Registrar. He alleged that he and another brother the third defendant were in actual possession of the property. Venkatasubba Rao, J., referred to section 39 of the Specific Relief Act and pointed out that that provision did not contemplate that the plaintiff should himself ask for the cancellation and delivering up of the instrument and that it would be sufficient if the plaintiff asked that it should be adjudged void or voidable. He said that it was the function of the Court to order that it should be delivered up and cancelled and, if it was registered, to send a copy of its decree to the Registrar who should note on the copy of the instrument contained in his books the fact of its cancellation. In this view the learned Judge held that the prayer relating to cancellation was unnecessary and superfluous and that it was not obligatory on the plaintiff to have the will set aside, that therefore Article 91 did not apply but the ordinary 12 years period governed the case. With regard to the court-fees payable, it was found that Article 17-A (1) of the Court-Fees Act was applicable and not section 7 (iv) (*c*). Thus it would be seen that the suit was treated virtually as a suit for a declaration alone where no consequential relief was prayed and not a suit for a declaratory decree where consequential relief was required. The second point of distinction is that in this case also the document that was in dispute was not executed by the plaintiff.

The next case that I would refer to is the decision of Wadsworth, J., in *Vellayya* v. *Ramaswami*[7]. That was a suit by a creditor under section 53 of the Transfer of Property Act for a declaration that an alienation made by the debtor was void against the creditors and the question was whether it was a suit for cancellation of a document under section 7 (iv-A) of the Court-Fees Act or a suit where no consequential relief was prayed falling under Article 17-A. It was held that the case fell under Article 17-A. The learned Judge was at pains to point out that in cases under section 53 of the Transfer of Property Act, the relief asked for is a declaration that the sale is not binding upon the creditors to the extent of their debts

1. A.I.R. 1929 Mad. 478.
2. (1890) I L R. 14 Mad. 26.
3. (1908) 18 M.L.J. 277 : L.R. 35 I.A. 98 : I.L.R. 35 Cal. 551 (P.C.).
4. (1923) I.L.R. 48 Bom. 166.
5. (1919) 55 I.C. 766.
6. (1929) 56 M.L.J. 394.
7. (1939) 2 M.L.J. 400 : I.L.R. (1940) Mad. 73.

and not a prayer for the cancellation of the instrument of alienation, because not being a party thereto, the plaintiff cannot ask for its being cancelled. This aspect was effectively brought out in a clear distinction that the learned Judge drew between the two sets of cases. The first set is one where the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party and the second set of cases is where the plaintiff is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, and he is not in a position to get that decree or that deed cancelled *in toto*. It was pointed out that in the former class of cases he must get a declaration that the decree is void *in toto* and whatever actual relief may be that he asked for, his suit is in substance a suit for the cancellation of the decree or deed even though it is framed as a suit for a declaration. In the latter category of cases, the proper remedy would be in order to clear the way to establish his title to get a declaration that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed. This distinction, it was pointed out, was made clear in *Unni* v. *Kunchi Amma*[1] and in *Chathu Kutty Nair* v. *Chathu Kutty Nair*[2]. In that case and *Vellayya* v. *Ramaswami*[3] also neither was the plaintiff a party to the impugned document nor was a declaration or cancellation of the said document asked for.

Next is the Full Bench decision of this Court in *Ramaswami Aiyangar* v. *Rangachariar*[4]. That was a suit for partition by an undivided member of a joint Hindu family *inter alia* questioning the alienation made by the father; there was no prayer for declaration or cancellation of the instruments, the prayer asked for being an account of the moveable and immoveable joint family properties and partition by metes and bounds of the plaintiff's one-fifth share. The main question there was whether Article 17-B of the Court-Fees Act applied or section 7 (v) or 7 (iv) (*b*). With regard to certain decrees passed against the plaintiff in suits in which he had been *eo nomine* impleaded as a party, however, it was held that the fee prescribed under section 7 (iv-A) would have to be paid, that such decrees were binding on him until set aside, and that therefore he cannot seek to obtain a decision on the footing that his interest in the joint family property is not affected by them. It was further observed that the plaintiff must be held to have impliedly asked for a cancellation of the decrees passed against him and must accordingly stamp his plaint *ad valorem* on the amount of the decrees and not merely on his share fraction, as his liability is for the full amount, though necessarily limited to the extent of his share in the joint family assets. There were certain other deeds to which he appears to have been made a party by his father and with regard to them the Full Bench held by a majority:

> "that the plaintiff could not be required to pay separate court-fee as regards any of them even though he had impleaded the several creditors or alienees and even if the plaint had contained prayers for declarations or cancellations in respect of the said transactions."

The last mentioned dictum was based on the observations of the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[5], which I have already adverted to in brief in the earlier portion of this judgment. After setting out the relevant passage, the learned Chief Justice said:

> "In such cases even if the plaint contains a prayer for a declaration or cancellation, there is good reason for holding it to be one for a purely incidental, but unnecessary relief. As I have indicated there is no such prayer in the plaint and in the light of the principles explained there is no justification for implying them and then demanding a fee for it."

From the last quotation it is clear that no prayer was contained in the plaint for a declaration or cancellation with regard to the alienations to which the plaintiff

1. (1890) I.L.R. 14 Mad. 26.
2. (1923) 19 L.W. 249.
3. (1939) 2 M.L.J. 400 : I.L.R. (1940) Mad. 73.
4. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.).
5. (1907) 17 M.L.J. 154 : L.R. 34 I.A. 87 : I.L.R. 34 Cal. 329 (P.C.).

was *eo nomine* a party, and that the decision on this point rested on the consideration that under the substantive law by which the plaintiff was governed, he was not bound to sue for a declaration or cancellation in respect of any of those transactions. Reliance was placed by the Full Bench on *Unni* v. *Kunchi Amma*[1], where the following words, which were taken from an unreported decision of this Court occur :

"If a person not having authority to execute a deed or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it, to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist."

Adinarayana v. *Rattammal*[2], decided by Horwill, J., was a case where the transaction was impugned as sham, nominal and inoperative and of no legal effect. It was alleged to have been executed nominally for the purpose of screening the donor's property from his creditors. The donor was subsequently dispossessed of this property and he sued for a declaration that in spite of the gift deed executed by him in favour of his first wife, he was still the owner and was entitled to a decree for possession. The question was whether it was a suit for a declaration and consequential relief or in substance a suit for the cancellation of the gift deed. The learned Judge held that section 7 (iv-A) did not apply and that it was a suit where a declaration was asked for with a consequential relief. Here, though the plaintiff was a party to the questioned document, he did not specifically ask it to be declared that the document was sham or nominal and of no effect against him. He asked for a declaration of his title to the property and for possession. The learned Judge examined a number of cases that were cited before him, most of which have already been adverted to in this judgment. Referring to a decision in *Singarappa* v. *Talari Sanjivappa*[3] which was relied upon by the Government Pleader, the learned Judge remarked :

"There, the deed with which the learned Judges were concerned, was alleged to be a sham sale deed in favour of the defendants; and the question was one of limitation. The learned Judges held that the suit had to be brought within three years from the date when the plaintiff apprehended that the defendants had set up title under the instrument; but that was a case in which the plaintiff specifically asked to have the deed cancelled; and the learned Judges did not consider whether it was necessary for the plaintiff to pray for the cancellation of the document. Moreover, the matter did not arise, because the suit was held to be within time. *If a plaintiff sues for a declaration, he would have to pay court-fees under section 7 (iv-A) of the Court-Fees Act, whether it was necessary to have the deed cancelled or not.*"

The last sentence italicized by me very clearly indicates that even apart from the question whether the particular relief is necessary or not, it is open to a party even to seek unnecessary reliefs ; and if he has chosen to ask for a particular declaration touching the validity and binding nature of a document, he will have to pay court-fees under section 7 (iv-A). This is as stated in *Unni* v. *Kunchi Amma*[1] on the principle of removing a cloud on the plaintiff's title and preventing further litigation. Horwill, J., referred to the decision of Wadsworth, J., in *Vellayya* v. *Ramaswami*[4], and the distinction that he drew between the two classes of cases that have been already set out by me. With reference to the two categories of cases, the learned Judge pointed out that although the statement of the law as stated by Wadsworth, J., was correct in all cases of decrees and with regard to voidable deeds, there is an exception to the general rule with regard to deeds which are intended to be inoperative and with reference to such documents unless the plaintiff expressly sued for a declaration even though he was a party to it, it was open to him to ignore the same and seek substantive relief against the property itself.

Lastly reference was made to a decision of mine in *Ramanujam Pillai* v. *Ramaswami Pillai*[5] where I followed the decision of Horwill, J. In that case the plaintiff was not a party to the impugned document and no declaration was asked for

1. (1890) I.L.R. 14 Mad. 26.
2. (1944) 1 M.L.J. 497.
3. (1904) 15 M.L.J. 228 : I.L.R. 28 Mad.
4. (1939) 2 M.L.J. 400 : I.L.R. (1940) Mad. 73.
5. (1945) 2 M.L.J. 582.

concerning the document. That arose out of a suit by a mortgagee who contended that certain prior transactions between the defendant and third parties were nominal and never intended to be given effect to and were not binding on the mortgagee-plaintiff.

As I have already stated, in none of the cases referred to above was it held that where as in the present case the plaintiff himself was a party to a deed and where he specifically prayed in the plaint for a declaration that the deed in question was a benami one and that it was sham and nominal and was not valid in law, the plaint could be treated as merely for possession of the property, the relief asked touching the document being altogether ignored for court-fee purposes. The plaintiff's case as set out in the plaint is that it is essential to get rid of the document as if the sale deed should be allowed to stand, much injury would result to him. He also states that up to the date of the suit the properties were not in the plaintiff's possession nor were they in the defendant's possession. He further states that he has asked for possession more or less as a matter of formality since the defendant has obtained symbolical possession of the property through the Court. He definitely states that he claims possession as a consequential relief although the defendant has not obtained actual possession of the properties; in fact the very cause of action is based upon the execution of the deed and the only substantial relief that is asked for is that the obstruction caused by his sale deed dated 16th December, 1942, should be removed from his way. Far from treating the prayer for declaration as a mere unnecessary or superfluous prayer or as a surplusage, the plaint shows that that is in substance as well as in effect the main if not virtually the sole relief that he wants the Court to grant. I agree with the conclusion of the learned District Munsiff that section 7 (iv-A) governs the case and that court-fee should be paid on the actual market value of the property affected by the sale deed dated 16th December, 1942.

The civil revision petition is dismissed with costs (one set).

V.P.S. ——— *Petition dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT:—LORD WRIGHT, LORD SIMONDS, LORD UTHWATT AND SIR JOHN BEAUMONT.

Pulukuri Kottayya and others .. *Appellants**

v.

The King-Emperor .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 162 and 537—Right given to the accused by section 162—Nature and extent of—Prejudice to accused by denial of such right—Circumstances—Curability under section 537—Test—Evidence Act (I of 1872), section 27—Scope of—"Fact discovered"—Meaning—Nature of information relating to the "fact discovered" that is admissible.

The right given to an accused person by section 162 of the Criminal Procedure Code is a very valuable one and often provides important material for cross-examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to gauge its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate, and may lead to the ultimate breakdown of the whole of his evidence. Where the statements are never made available to the accused, an inference, which is almost irresistible, arises of prejudice to the accused.

But where the statements were made available though too late to be effective it was *held*, in the peculiar circumstances of the case, that no prejudice was occasioned to the accused by the failure to produce in proper time the note-book of the sub-inspector in which the statements were recorded.

The contention that a breach of the direct and important provisions of the Code of Criminal Procedure cannot be cured under section 537, Criminal Procedure Code, is based on too narrow a view of the operation of that section. When a trial is conducted in a manner different from that prescribed by the Code (as in *N.A. Subramania Iyer's case*[1]) the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537 and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction between an illegality and an irregularity in this connection is one of degree rather than of kind. Where there

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* P. C. Appeal No. 37 of 1946. 19th December, 1946.

1. (1901) 11 M.L.J. 233 : L.R. 28 I.A. 257 : I.L.R. 25 Mad. 61 (P.C.).

has been a breach of the proviso to section 162, Criminal Procedure Code, and no prejudice was occasioned to the accused, the case falls under section 537 and the trial would be valid in spite of the breach of the provisions of the Criminal Procedure Code.

Section 27 of the Evidence Act provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. It is fallacious to treat the "fact discovered" within section 27 as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered and so would not be admissible in evidence.

Sukhan v. *The Crown*, (1929) I.L.R. 10 Lah. 283 and *Ganu Chandra Kashid* v. *Emperor*, (1931) I.L.R. 56 Bom. 172, approved; In re *Athappa Goundan*, (1937) 2 M.L.J. 60: I.L.R. (1937) Mad. 695 (F.B.), overruled.

Where evidence has been admitted which ought not to have been admitted, the duty of the appellate Court before which objection is raised is to find whether after discarding the evidence improperly admitted, there was left sufficient evidence to justify the conviction.

Appeal by special leave against the judgment and order of the High Court of Judicature at Madras (Horwill and Bell, JJ.) dated 22nd October, 1945[1], dismissing an appeal against the judgment and order of the Court of Session, Guntur Division.

Pritt, K.C., for Appellants.

Megaw on behalf of the Crown.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal by special leave against the judgment and order of the High Court of Judicature at Madras, dated 22nd October, 1945[1], dismissing an appeal against the judgment and order of the Court of Session, Guntur Division, dated the 2nd August, 1945, whereby the appellants, who were accused Nos. 1 to 9, and nine others, were found guilty on charges of rioting and murder. Appellants 1, 2, 3, 4, 7 and 8 were sentenced to death, and appellants Nos. 3 to 9 were sentenced to transportation for life. There were other lesser concurrent sentences which need not be noticed. At the conclusion of the arguments their Lordships announced the advice which they would humbly tender to His Majesty, and they now give their reasons for that advice.

The offence charged was of a type common in many parts of India in which there are factions in a village, and the members of one faction are assaulted by members of the other faction, and in the prosecution which results, the Crown witnesses belong to the party hostile to the accused; which involves that their evidence requires very careful scrutiny. In the present case the assessors were not prepared to accept the prosecution evidence, but the learned Sessions Judge, whilst taking careful note of the fact that the six eye-witnesses were all hostile to the accused, nevertheless considered that the story which they told was substantially true, and accordingly he convicted the accused. As already noted, this decision was upheld by the High Court in appeal.

The grounds upon which leave to appeal to His Majesty in Council was granted were two:

1. The failure of the prosecution to supply the defence at the proper time with copies of statements which had been made by important prosecution witnesses during the course of the preliminary police investigation involving, it is alleged, a breach of the express provisions of section 162 of the Code of Criminal Procedure.

2. The alleged wrongful admission and use in evidence of confessions alleged to have been made whilst in police custody by appellants Nos. 3 and 6. This point involves an important question as to the construction of section 27 of the Indian Evidence Act upon which the opinions of High Courts in India are in conflict.

1. R. T. No. 143 of 1945.

Their Lordships will deal first with the alleged infringement of section 162 of the Code of Criminal Procedure. The relevant portions of that section are as follows :—

"162. (1) No statement made by any person to a police-officer in the course of an investigation under this chapter shall, if reduced into writing, be signed by the person making it ; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination."

The facts material upon this part of the case are these. The offence took place at about 6-30 P.M. on the 29th December, 1944, and at 7 A.M., on the 30th December, the police Sub-Inspector held an inquest on the body of one of the murdered men. He examined five of the prosecution witnesses, including four of the alleged six eye-witnesses, and wrote down their statements in his note-book. After the conclusion of the inquest the Circle Inspector took over the investigation from the police Sub-Inspector and on the same day, that is, the 30th December, he examined all the alleged eye-witnesses and others, including all the witnesses who had been examined by the police Sub-Inspector, and their statements were recorded in the case diary prepared by the Circle Inspector. It is the failure to produce the note-book of the police Sub-Inspector which constitutes the alleged infringement of the proviso to section 162, and the facts as to this are stated in an affidavit of Gutlapally Venkata Appayya sworn on the 19th October, 1945, and are not challenged. Prior to the commencement of the preliminary inquiry before the Magistrate an application was made on behalf of the accused for grant of copies of statements under section 162 of the Code of Criminal Procedure recorded by the Sub-Inspector and the Circle Inspector of Police from the prosecution witnesses in the case during investigation. The accused were supplied with copies of statements made by witnesses before the Circle Inspector of Police and were informed that statements made to the Sub-Inspector of Police were not available. During the Sessions trial, when prosecution witness No. 2, who was the principal prosecution witness, was in the witness-box, counsel for the accused represented to the Court that he had not been supplied with copies of statements recorded by the Sub-Inspector at the first inquest, and requested the Court to make those statements available to enable him to cross-examine the important prosecution witnesses with reference to the earliest statements. The learned Sessions Judge directed the Public Prosecutor to comply with the request. The Public Prosecutor, after consulting the Sub-Inspector and Circle Inspector, who were present in Court, submitted to the Court that except what was recorded in the inquest report itself, no other statements were recorded by the Sub-Inspector, and the learned Judge directed the defence counsel to proceed. The next day, when the cross-examination of prosecution witness No. 2 was continued, counsel for the accused submitted to the Court that he desired to file an application for copies of statements recorded by the Sub-Inspector at the first inquest so that it might be endorsed by the prosecution that no such record of statements existed. Then the Public Prosecutor stated to the Court that he fully realized his responsibility in making the statements he had made on the previous day, but there was no record of any statement made at the inquest available. On the fourth day of the trial, after the principal prosecution witnesses had been discharged, the police Sub-Inspector gave evidence, and he then produced in the witness-box his note-book containing the statements of the five witnesses he had examined at the inquest, and a copy of such statements was then supplied to the accused. There are some discrepancies between the statements made to the police Sub-Inspector and the statements of the witness in the witness-box, but it is not suggested that such discrepancies are of a vital nature.

It is clear from the facts narrated above that there was a breach of the proviso to section 162 of the Code of Criminal Procedure, and that the entries in the police Sub-Inspector's note-book were not made available to the accused, as they should have been, for the cross-examination of the witnesses for the Crown. The right given to an accused person by this section is a very valuable one and often provides important material for cross-examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to gauge its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate, and may lead to the ultimate break-down of the whole of his evidence; and in the present case it has to be remembered that the accuseds' contention was that the prosecution witnesses were false witnesses. Courts in India have always regarded any breach of the proviso to section 162 as matter of gravity. *Baliram* v. *King-Emperor*[1], where the record of statements made by witnesses had been destroyed and *Emperor* v. *Bansidhar and others*[2], where the Court had refused to supply to the accused copies of statements made by witnesses to the police, afford instances in which failure to comply with the provisions of section 162 have led to the convictions being quashed. Their Lordships would, however, observe that where, as in those two cases, the statements were never made available to the accused, an inference, which is almost irresistible, arises of prejudice to the accused. In the present case, the statements of the witnesses were made available though too late to be effective, and their contents are known. This by itself might not be decisive, but, as already noted, the Circle Inspector re-examined the witnesses whom the police Sub-Inspector had examined, and did so on the same day. The notes of the examination by the Circle Inspector were made available to the accused at the earliest opportunity and when the note-book of the police Sub-Inspector was produced towards the end of the prosecution case, counsel for the accused was in a position to ascertain whether there was any inconsistency between the statements made to the police Sub-Inspector and those made later in the day to the Circle Inspector. If any such inconsistency had been discovered, this would have been a strong point for the accused in their appeal, but no such point was taken; indeed, the only complaint upon this subject in the High Court was that the police Sub-Inspector ought to be presumed to have prepared a case diary which he was suppressing. The High Court rejected this contention, rightly as their Lordships think. Nor has any such point been taken before this Board, and the entries from the Circle Inspector's diary are not on record. In the result, their Lordships are satisfied that, in the peculiar circumstances of this case, no prejudice was occasioned to the accused by the failure to produce in proper time the note-book of the police Sub-Inspector.

Even on this basis, Mr. Pritt for the accused has argued that a breach of a direct and important provision of the Code of Criminal Procedure cannot be cured, but must lead to the quashing of the conviction. The Crown, on the other hand, contends that the failure to produce the note-book in question amounted merely to an irregularity in the proceedings which can be cured under the provisions of section 537 of the Code of Criminal Procedure if the Court is satisfied that such irregularity has not in fact occasioned any failure of justice. There are, no doubt, authorities in India which lend some support to Mr. Pritt's contention, and reference may be made to *Tirkha and another* v. *Nanak and another*[3], in which the Court expressed the view that section 537 of the Code of Criminal Procedure applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of, or disobedience to, mandatory provisions of the Code, and to In re *Madura Muthu Vannian*[4], in which the view was expressed that any failure to examine the accused under section 342 of the Code of Criminal Procedure was fatal to the validity of the trial and could not be cured under section 537. In their Lordships' opinion this argument is based on too narrow a view of the operation of section 537. When a trial is conducted in a manner different from that prescribed by the Code (as in

1. I.L.R. (1945) Nag. 151.
2. (1930) I.L.R. 53 All. 458.
3. (1927) I.L.R. 49 All. 475.
4. (1922) 43 M.L.J. 402 : I.L.R. 45 Mad. 820.

N. A. Subramania Iyer's case[1]), the trial is bad, and no question of curing an irregularity arises, but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of the degree rather than of kind. This view finds support in the decision of their Lordships' Board in *Abdul Rahman* v. *The King-Emperor*[2], where failure to comply with section 360 of the Code of Criminal Procedure was held to be cured by sections 535 and 537. The present case falls under section 537, and their Lordships hold the trial valid notwithstanding the breach of section 162.

The second question, which involves the construction of section 27 of the Indian Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read are in these terms :

"25. No confession made to Police officer shall be proved as against a person accused of any offence.

26. No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

The explanation to the section is not relevant.

"27. Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence ; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the " fact discovered " is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the pursuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to section 26, added by section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the " fact discovered " within the section as equivalent to the object produced ; the fact discovered embraces

1. (1901) 11 M.L.J. 233 : L.R. 28 I.A. 257 : I.L.R. 25 Mad. 61 (P.C.).
2. (1926) I.L.R. 5 Rang. 53.

the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that " I will produce a knife concealed in the roof of my house " does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added " with which I stabbed *A* " these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

High Courts in India have generally taken the view as to the meaning of section 27 which appeals to their Lordships, and reference may be made particularly to *Sukhan* v. *The Crown*[1] and *Ganu Chandra Kashid* v. *Emperor*[2], on which the appellants rely, and with which their Lordships are in agreement. A contrary view has, however, been taken by the Madras High Court, and the question was discussed at length in a Full Bench decision of that Court In re *Athappa Goundan*[3], where the cases were referred to. The Court whilst admitting that the weight of Indian authority was against them, nevertheless took the view that any information which served to connect the object discovered with the offence charged was admissible under section 27. In that case the Court had to deal with a confession of murder made by a person in police custody, and the Court admitted the confession because in the last sentence (readily separable from the rest) there was an offer to produce two bottles, a rope, and a cloth gag, which, according to the confession had been used in, or were connected with, the commission of the murder, and the objects were in fact produced. The Court was impressed with the consideration that as the objects produced were not in themselves of an incriminating nature their production would be irrelevant unless they were shown to be connected with the murder, and there was no evidence so to connect them apart from the confession. Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into section 27 something which is not there, and admitting in evidence a confession barred by section 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.

In their Lordships' opinion *Athappa Goundan's case*[3] was wrongly decided and it no doubt influenced the decision now under appeal.

The statements to which exception is taken in this case are first a statement by accused No. 6 which he made to the police Sub-Inspector and which was reduced into writing, and is Ex. "P." It is in these terms :

" The mediatornama written at 9 A.M. on 12th January, 1945, in front of Maddineni Verrayya's choultry and in the presence of the undersigned mediators.

Statement made by the accused Inala Sydayya on being arrested. About 14 days ago, I Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Boddupati Chinna Sivayya and Subbayya to death. The remaining persons, Pullayya, Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kotayya."

(Signed) POTLA CHINA MATAYYA.
(„) KOTTA KRISHNAYYA.

12th January, 1945.

(Signed) G. BAPAIAH,
Sub-Inspector of Police.

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1. (1929) I.L.R. 10 Lah. 283.
2. (1931) I.L.R. 56 Bom. 172.
3. (1937) 2 M.L.J. 60 : I.L.R. (1937) Mad. 695 (F.B.).

The whole of that statement except the passage "I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" is inadmissible. In the evidence of the witness Potla China Mattayya proving the document the statement that accused 6 said "I Mattayya and others went to the corner of the tank-land. We killed Sivayya and Subbayya" must be omitted.

A confession of accused 3 was deposed to by the police Sub-Inspector, who said that accused 3 said to him:

"I stabbed Sivayya with a spear, I hid the spear in a yard in my village. I will show you the place."

The first sentence must be omitted. This was followed by a Mediatornama. Ex. Q-1 which is unobjectionable except for a sentence in the middle.

"He said that it was with that spear that he had stabbed Boddapati Sivayya,"

which must be omitted.

The position therefore is that in this case evidence has been admitted which ought not to have been admitted, and the duty of the Court in such circumstances is stated in section 167 of the Indian Evidence Act, which provides:

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

It was therefore the duty of the High Court in appeal to apply its mind to the question whether, after discarding the evidence improperly admitted, there was left sufficient to justify the convictions. The Judges of the High Court did not apply their minds to this question because they considered that evidence was properly admitted, and their Lordships propose therefore to remit the case to the High Court of Madras, with directions to consider this question. If the Court is satisfied that there is sufficient admissible evidence to justify the convictions, they will uphold them. If on the other hand they consider that the admissible evidence is not sufficient to justify the convictions they will take such course, whether by discharging the accused or by ordering a new trial, as may be open to them.

Their Lordships have, therefore, humbly advised His Majesty that this appeal be allowed and that the case be remitted to the High Court of Madras, with directions to consider whether the evidence on record apart from the confessional statements of accused No. 3 and accused No. 6 which their Lordships have held to be inadmissible, is sufficient to justify the convictions and to make such order in the matter as may be right having regard to their decision upon the question remitted to them.

V.S. *Appeal allowed and case remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Rethu Venkata Appala Naidu and others .. *Accused.**

Criminal Procedure Code (V of 1898), section 522 (1) and (3)—Conviction for trespass—Offence attended by criminal force and complainant dispossessed by show of force or use of force—Order denying restoration of possession to complainant—Legality.

To pass an order for restoration of possession on conviction for trespass, what all is required is that the offence should have been attended by criminal force or by show of force or by criminal intimidation and it should appear that by such force or show of force the complainant was dispossessed. Hence, where an offence of trespass was attended by criminal force, and the complainant was dispossessed of the land by show of force or use of force, it would be wrong to deny restoration of possession to the complainant.

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* Crl. R. C. No. 1253 of 1946. (Case Referred No. 50 of 1946). 13th February, 1947.

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, 1898, by the Sessions Judge, Vizagapatam, in his letter, dated 12th November, 1946.

Accused not represented.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is a reference made by the Sessions Judge, Vizagapatam, under section 438 of the Code of Criminal Procedure to revise the order made by the Sub-Divisional Magistrate, Vizianagaram, under section 522 (1). It was a case of trespass against the three accused for which they were convicted. Following the conviction the complainant applied under section 522 (3) of the Code of Criminal Procedure for the restoration of possession of the land to him. The Sub-Divisional Magistrate took the view that section 522 (3) would apply only if there was show of force or use of force. The learned Sessions Judge has pointed out that that view is not correct and that what is required is that the offence should have been attended by criminal force or show of force or by criminal intimidation and it should appear to the Court that by such force or show of force the complainant was dispossessed of the land. In the present case there was evidence, as indicated by the learned Sessions Judge, that the offence was attended by criminal force and that the complainant was dispossessed of the land by show of force or use of force. The order of the Sub-Divisional Magistrate under sub-section (3) of section 522 of the Code of Criminal Procedure is set aside and the three accused are directed to restore possession of the land to complainant's legal representatives as it is reported that the complainant has since died.

K. C. — *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

V. Venkatasami Chetty .. *Appellant**

v.

D. Panchakshara Reddy and others .. *Respondents.*

Contract Act (*IX of* 1872), *section* 63—*Agreement remitting portion of the amount due under promissory notes and making the balance payable by a fixed date—Failure to pay balance—Whole amount if recoverable—Remission* in praesenti *or agreement to remit—Test—Remission in part—Validity—Consideration—If essential.*

An agreement between the parties to two promissory notes provided : "The balance due is Rs. 5,309-2-11, out of which the amount excused out of grace is Rs. 3,809-2-11, the balance of Rs. 1,500 shall be paid by 30th June, 1942 and the two bonds executed and delivered on 15th May, 1941, shall be taken back after getting the endorsement of payment made thereon." In suits on the promissory notes,

Held, the language clearly indicates that to the extent to which there was a remission out of grace it was a remission *in praesenti* and under section 63 of the Contract Act there could be a remission in part as well. The failure to follow up the remission by payment of the balance does not invalidate the remission and make the whole amount payable. The remission was valid even though it was not supported by consideration by reason of section 63 of the Contract Act.

Ramaswami v. *Rudrappa*, A.I.R. 1939 Mad. 688, explained and *Jitendra Chandra Roy Chowdhuri* v. *S. N. Banerji*, I.L.R. (1943) 1 Cal. 101, applied.

Appeals against the decrees of the District Court, Chittoor, in A. S. Nos. 129 and 145 of 1943, preferred against the decrees of the Court of the Subordinate Judge of Chittoor O. S. Nos. 45 and 46 of 1942, respectively.

S. A. Seshadri and *G. Ramalinga Reddi* for Appellant.

K. Subba Rao and *Messrs. Short Bewes & Co.* for Respondents.

The Court delivered the following

JUDGMENT.—The only point for decision in these appeals is whether the remission of the entire amount due except Rs. 1,500 granted by the agreement evidenced

* S. As. Nos. 710 and 711 of 1945. 28th August, 1946.

by Ex. D-3 is invalid and cannot be claimed under section 63 of the Contract Act unless the balance of the amount payable had also been paid and the contract itself had been wiped out. These two appeals arise out of two suits on two promissory notes. The plaintiff in both is the same. The defendants are different. The promissory notes were executed for money due under prior dealings. Interest was payable under the promissory notes. The defendants' case is that on the 16th June, 1942, accounts were taken and it was agreed then that a certain amount should be paid and that the balance payable was only Rs. 1,500 and that it should be paid on 30th June, 1942. The question was whether the amount cited as having been remitted in Ex. D-3 was not validly remitted and whether the plaintiff was entitled to eschew that remission and claim the entire amount. The question was considered with reference to section 63 of the Contract Act. The first Court held that since the entire debt was not discharged but there was a promise to remit and a promise to remit cannot be valid and the entire amount was therefore decreed. On appeal the District Judge of Chittoor held that there was a valid remission and that under section 63 there could be a remission of the entire debt, that in this case there had been a valid remission to that extent and that the plaintiff is not entitled to claim the amount already remitted.

It is urged before me that this is only a case of a promise to remit and not a case of actual remission and that therefore on the principle of the decision in *Ramaswami* v. *Rudrappa*[1], the remission is not valid. I have sent for the records in the suit in which that ruling was given and it is clear from the records that what was pleaded there was not an actual remission, but an agreement to remit. The decision in *Balasundara Naicker* v. *Ranganadha Aiyar*[2], applied to the facts of that case as it was a case of an agreement to remit. In *Jitendra Chandra Roy Chowdhuri* v. *S. N. Banerjee*[3], which is relied upon by the District Judge is the case which applies to the facts of this case. Where there is a remission, whether the remission is in whole or in part, and is not a mere promise to remit in the future, if it is *in praesenti*, then it will be valid and does not require consideration. The decision in *Ramaswami* v. *Rudrappa*[1] cannot govern this case, because on the facts of that case there was only an agreement to remit in the future. But in this case in Ex. D-3, it is definitely stated :

"The balance due is Rs. 5,309-2-11, out of which the amount excused out of grace is Rs. 3,809-2-11, the balance of Rs. 1,500 (Rupees one thousand and five hundred) shall be paid by 30th June, 1942 and the two bonds executed and delivered on 15th May, 1941, shall be taken back after getting the endorsement of payment made thereon."

The language clearly indicates that to the extent to which there was a remission out of grace it was a remission *in praesenti*. The word used was in the past tense "the amount excused is so and so" and under section 63 of the Contract Act there could be a remission in part as well. If as contended for the appellant a remission like this must be followed by payment of the balance and the extinguishing of the debt to that extent, there could be no remission at all *in praesenti* at the time when the remission is made and I do not think it could be said that the language of section 63 warrants this construction. I therefore find that the learned District Judge was justified in finding that there was a remission *in praesenti* at the time of Ex. D-3 and therefore it was valid even though it was not supported by consideration by reason of section 63 of the Contract Act.

The appeals accordingly fail and are dismissed with costs.

(No leave).

K.S. *Appeals dismissed.*

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1. A.I.R. 1939 Mad. 688.
2. (1929) 58 M.L.J. 503 : I.L.R. 53 Mad. 127.
3. I.L.R. (1943) 1 Cal. 101.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

Thummalapalli Viswanadham .. *Appellant**

v.

Sokalachand Chunnilal and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), *sections* 23 *and* 25-*A—Application under section* 23 *to set aside sale on the ground that applicant was an agriculturist entitled to the benefits of the Act—Dismissal for default on vakil reporting "no instructions"—If can be regarded as an order refusing to set aside the sale and appealed against under section* 25-*A—Civil Procedure Code* (*V of* 1908), *section* 141 *and Order* 9, *rules* 8 *and* 9.

By virtue of section 141 of the Civil Procedure Code the procedure under Order 9 is attracted to the trial of petitions under the main provisions of Madras Act IV of 1938.

An order dismissing an application under section 23 of Madras Act IV of 1938 to set aside a sale on the ground that the applicant was an agriculturist entitled to the benefits of the Act, on the vakil reporting "no instructions," cannot be regarded as one on the merits refusing to set aside the sale and appealed against under section 25-A of the Act. The order is not a decision either to grant or to refuse the prayer in the petition but is an order of a procedural nature under Order 9, rule 8 of the Code of Civil Procedure giving rise to the remedy of an application for restoration and a special right of appeal conferred under Order 43, rule 1 of the Code in case such an application is dismissed.

Appeal against the order of the Court of the Subordinate Judge, Narasapur, and made in A. S. No. 80 of 1944 preferred against the order of the Court of the District Munsiff, Bhimavaram in E. A. No. 594 of 1938 in E. P. No. 202 of 1935 in O. S. No. 34 of 1932, Subordinate Judge's Court, Bezwada.

P. V. Vallabhacharyulu for Appellant.

G. Chandrasekhara Sastri, D. Narasaraju, P. Satyanarayana Rao and *V. Viyyanna* for Respondents.

The Court delivered the following

JUDGMENT.—On 23rd November, 1937, a sale was held in execution of a decree. On 6th May, 1938, an application was preferred by the judgment-debtor under section 23 of Madras Act IV of 1938 to set aside the sale on the ground that he was an agriculturist entitled to the benefits of that Act. The application was pending till 10th June, 1944, when the District Munsiff passed the following order :

"(1) Petitioner absent and his vakil reports no instructions.

(2) Petition dismissed with costs."

No attempt was made to get the application restored to file. The lower appellate Court assumes that the procedure under Order 9, rule 9 of the Code of Civil Procedure would not be available ; but I am of the opinion that that assumption is wrong having regard to the decision in *Satyanarayana* v. *Peddi Naidu*[1]. Instead of taking the procedure of applying for restoration of the application, the applicant filed an appeal purporting to be under section 25-A incorporated into Madras Act IV of 1938 by the Amending Act XV of 1943. That section provides :

"An appeal shall lie from any of the following orders passed by a Court under this Act, as if such order related to the execution, discharge or satisfaction of a decree within the meaning of section 47 of the Code of Civil Procedure . . . . . . (C) An order under section 23 setting aside or refusing to set aside any sale or foreclosure of immoveable property."

The Subordinate Judge held that no appeal lay and the present second appeal questions the correctness of that order. The only question, therefore, is whether this order dismissing the petition owing to the absence of the petitioner and his vakil reporting "No instructions" can be regarded as an order under section 23 of Madras Act IV of 1938 refusing to set aside the sale.

It is argued for the appellant that seeing that this order is passed on a petition under section 23 under the Act, the order must be regarded as an order refusing to set aside the sale and that, necessarily, the appellate provision will be attracted to it. It seems to me that when once it is established that by reason of section 141 of the Code of Civil Procedure the provisions of Order 17 and Order 9 of the Code

* A. A. A. O. No. 236 of 1945. 21st February, 1947.

1. (1940) 2 M.L.J. 940.

of Civil Procedure are attracted to the trial of petitions under section 23 of the Madras Act IV of 1938, the logical way of regarding this order dismissing the application for default, is to regard it as an order, not under section 23 of Madras Act IV of 1938, but under Order 9, rule 8 of the Code of Civil Procedure. Seeing that such an order would give rise to a right to apply for the restoration of the application and its hearing on the merits, it must necessarily be held that there is no order on the merits already. If the dismissal for default was to be regarded as an order refusing to set aside the sale, then the restoration of the application to file would be of no avail to the applicant, for he would be confronted with the decision on the merits adverse to him, with reference to which his only remedy would be an appeal without any evidence upon which to base his appeal. The scheme of the Code of Civil Procedure is to regard orders passed under Order 9, rule 8 of the Code as orders *sui generis* giving rise to the remedy of an application for restoration and a special right of appeal conferred under Order 43, rule 1 of the Code in case such an application is dismissed. It is not the intention of the Code—and that is made clear by the definition of " decree "—that the plaintiff whose suit has been dismissed for default should have two remedies, one, the remedy of an application to restore the suit to file and the other, an appeal against the dismissal as if it were a decree. When we hold that by virtue of section 141 of the Code of Civil Procedure, the procedure under Order 9 is attracted to the trial of petitions under the main provisions of Madras Act IV of 1938, we are in fact holding that the dismissal for default of a petition such as that now under consideration is not a decision either to grant or to refuse the prayer in the petition but is an order of a procedural nature which attracts a special procedural remedy and does not give rise to the right of appeal attaching to the determination of the question on the merits. Looked at in that way, the order now under consideration cannot properly be regarded as an order refusing to set aside the sale ; for, had the petitioner applied for restoration of his application and shown good reason for his absence, this order would have provided no obstacle to the subsequent decision of his application on the merits. It is not, therefore, an order refusing to set aside the sale even though in certain circumstances such as those which have now arisen it may bar a future application for the same relief.

In this view I dismiss the second appeal with costs—two sets to be divided amongst the respondents. (Leave is refused).

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

P. Veda Bhat .. *Appellant**

v.

Mahalaxmi Amma and others .. *Respondents.*

*Landlord and tenant—Lease—*Mulgeni *lease—Forfeiture clause whether works when entire properties are transferred in parts by separate deeds.*

Where the lessee transferred her *mulgeni* rights first in some of the suit properties by one deed and then again the remainder of her properties by another deed, with the result that the *mulgeni* right was wholly alienated, on the question whether there was a forfeiture of the *mulgeni* lease,

Held, though covenants for forfeiture should be strictly construed against the landlord and alienations of a part of the holding do not work a forfeiture, there is no reason why, when by separate alienations the entire right in the tenancy has been transferred to third party strangers the forfeiture clause should not take effect. To hold that where tenancy is alienated in part by separate deeds, there is no forfeiture, notwithstanding the ultimate result that the tenancy has been completely parted with, is to enable the tenant to set at naught the forfeiture and re-entry clause by tricks and devices.

Terrell v. *Chatterton*, (1922) 2 Ch. 647, relied upon.

Appeal against the decree and judgment of the Court of the District Judge, South Kanara, dated 27th June, 1945, in A. S. No. 97 of 1943 (O. S. No. 486 of 1941, District Munsiff Court, Mangalore).

* S. A. No. 2257 of 1945. 24th January, 1947.

K. Y. Adiga, *K. P. Adiga* and *K. P. Bhat* for Appellant.

S. Ramayya Naick for Respondents.

The Court delivered the following

JUDGMENT.—In this second appeal preferred by the plaintiff, the primary question which arises for consideration is whether there has been a forfeiture of the *mulgeni* lease evidenced by Ex. P-1, by reason of alienations made by the *mulgeni* tenant, who is now the first defendant, of the tenancy. By Ex. P-7 she transferred her *mulgeni* rights in some of the properties, and by Ex. D-1 she transferred her right in the remainder of the properties, with the result that the *mulgeni* right has now been wholly alienated. Both the lower Courts have held that as the alienation under each deed of transfer was only of a part, no forfeiture has been incurred. The clause against alienation and providing for re-entry is set out at length in paragraph 24 of the District Munsiff's judgment.

In *Chatterton* v. *Terrell*[1] which was on appeal from the decision of the Court of Appeal in *Terrell* v. *Chatterton*[2] (which in turn reversed the decision of Astbury, J.) one of the learned Law Lords expressed himself thus :

> " My Lords, but for the fact that Astbury, J., found a defence to this action, I should have thought the case unarguable. I do not know which has given me the greater surprise, the decision of the learned Judge or some of the propositions with reference to terms and derivative terms of years which have been advanced by counsel at your Lordships' Bar."

Such surprise can be expressed of the decision by the lower Courts in this case. While it is perfectly true that covenants for forfeiture should be strictly construed against the landlord and that the alienations of a part of the holding have been uniformly held not to work a forfeiture it is very difficult to understand why, when by separate alienations the entire right in the tenancy has been transferred to third party strangers, the forfeiture clause should not take effect. If even then it is not to become operative, it really means that Courts are not to attach any value to such a clause under any circumstances. To hold that where the tenancy is alienated in parts by separate deeds, there is no forfeiture, notwithstanding the ultimate result that the tenancy has been completely parted with, is to enable the tenant to set at naught the forfeiture and re-entry clause by tricks and devices. This is pointed out by Younger, L.J., in his judgment in *Terrell* v. *Chatterton*[2]. That case was a stronger one, if any, for the tenant; for, as regards a portion of the premises transferred, the tenant took the consent of the landlord for the sub-letting. It is with reference to the remainder of the premises which was also sub-let a few days later that the consent was not obtained. The decision governs the present case.

On the question whether items 6 and 7 are accretions to the *mulgeni* holding, both the Courts have found that they are not. They were not prepared to presume from the fact that they were obtained by darkhast by the *mulgenidar* that he obtained them in his capacity as *mulgenidar* and after the date of the *mulgeni* tenancy. The finding is one of fact and must be accepted.

The learned advocate for respondents 2 to 5, who are the earlier alienees under Ex. P-7 has raised two questions. One is that the later alienation evidenced by Ex. D-1 was a collusive affair brought about by the plaintiff for the purpose of enabling him to say that there has been a forfeiture. This point is dealt with by the District Munsiff under the fourth issue in paragraph 27 of his judgment and has been found against them. The District Judge does not deal with it in the course of his judgment. Apparently, it was not raised before him. These defendants preferred a memorandum of objections in answer to the appeal preferred by the plaintiff and the memorandum covered only two points other than the point now raised.

The other question relates to the value of the improvements which was fixed by the District Munsiff at Rs. 259-12-0. What was the proper compensation for the improvements was not considered by the District Judge ; and it is urged that he should be called upon to decide it now. Here, again, I think the respondents

1. (1923) A.C. 578.
2. (1922) 2 Ch. 647 at 652.

are bound by what happened in the lower appellate Court. It was for them to have raised the question that they ought to have got more for the improvements said to have been effected by them. They could not assume that the appeal was going to be decided in their favour ; in the alternative of its being decided against them, they should have asked the District Judge to go into the question of improvements. They do not seem to have done so. I do not propose to set this question at large now. The defendants-respondents will get only the sum of Rs. 259-12-0 found as compensation for improvements by the District Munsiff.

The result is that the decrees of the lower Courts are set aside ; and the plaintiff will have a decree for possession of all the items except items 6 and 7, subject, however, to the payment to defendants of the sum of Rs. 259-12-0, as compensation for improvements. Mesne profits from the date of the notice, Ex. P-2, namely, 7th June, 1941, by which the plaintiff determined the lease till the date of delivery of possession will be determined by the first Court. There will also be a decree for arrears of rent as fixed by the first Court up to 7th June, 1941.

The parties will pay and receive proportionate costs right through.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Anthony Salvador Dias .. *Petitioner**

v.

A. Sivarama Rao .. *Respondent.*

Court-Fees Act (VII of 1870 as amended), section 7 (ix) and Schedule I, Article 1—Mortgage—Suit for redemption—Separate claim for damages—Court-fee payable.

The petitioner sued for redemption of a mortgage and paid court-fee under section 7 (ix) of the Court-Fees Act. In the body of the plaint the petitioner alleged that owing to the delay on the part of the respondent in paying the debts for which the consideration for the mortgage was retained by him, a suit had been filed against the petitioner, that insolvency proceedings had been instituted against him and that he had been arrested for debt. The petitioner further stated that for the worry, inconvenience, ignominy and mental distress apart from pecuniary loss which the proceedings had caused him, the petitioner was entitled to recover a specified amount as damages. The plaintiff however merely prayed for a decree for redemption on payment of any sum that may be found due by him on an account being taken.

Held, that the claim for damages was a separate relief from the claim to be entitled to redeem the mortgage and that hence separate court-fee was payable thereon.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, South Kanara, dated 12th June, 1945, in C. M. A. No. 47 of 1944 (O. S. No. 239 of 1944, District Munsiff Court, Mangalore).

S. J. S. Fernandez for Petitioner.

K. Y. Adiga and *K. P. Adiga* for Respondent.

The Court delivered the following

JUDGMENT.—The question in this civil revision petition relates to the court-fee payable on O. S. No. 239 of 1944, brought by the petitioner in the Court of the District Munsiff of Mangalore. The petitioner on 1st September, 1932, executed a usufructuary mortgage in favour of the respondent, the sum secured by the mortgage being Rs. 2,575. The petitioner brought the suit now in question for redemption of the mortgage and paid court-fee on the principal sum secured, namely, Rs. 2,575, under section 7, clause (ix) of the Court-Fees Act. Almost the whole of the mortgage money was retained with the respondent to pay debts due by the petitioner to respondent himself and other creditors. In the body of the plaint the petitioner alleges that owing to delay on the part of the respondent in paying the debts for which the consideration for the mortgage was retained by him, a suit had been filed against the petitioner ; insolvency proceedings had been instituted against him and he had been arrested for debt ; and in paragraph 7 of the plaint it is stated that " for the worry, inconvenience and ignominy and mental distress, apart from

* C. R. P. No. 1228 of 1945. 21st March, 1946.

pecuniary loss," which these proceedings had occasioned him, the petitioner was entitled to recover at least Rs. 2,000 from the defendant. In the concluding portion, however, of the plaint there is no specific reference to damages and it is stated that the plaintiff prayed for a decree against the defendant for the following reliefs :

"(1) Redemption of the suit property on payment by the plaintiff to the defendant of any sum the Court may on account being taken from the defendant found to be due to him and possession of the suit property" . . . .

The learned District Munsiff found that the claim for damages was a separate relief from the claim to be entitled to redeem the mortgage and accordingly found that court-fee was payable in respect of the sum of Rs. 2,000 claimed in addition to the court-fee payable for the redemption of the mortgaged property based on the principal amount secured, namely, Rs. 2,575. This meant that the District Munsiff had no jurisdiction to try the suit; and accordingly he directed that the plaint be returned for presentation to the proper Court.

It is argued by Mr. Fernandez for the petitioner that the claim for damages should not be regarded as a separate relief. He says that the petitioner is entitled to have the damages set off against the amount due under the mortgage, and that this amounts to no more than the taking of an account in order to ascertain the amount due to the respondent as a condition of redemption. In support of his argument he has referred me to the following decisions of this Court; *Govindan Nayar* v. *Ithaletty*[1], *Gopal Menon* v. *Raman Menon*[2], *Grandhi Pothanna* v. *Satyananda Charyulu*[3] and *Radhakrishna Chetti* v. *Teckla Schomberg*[4]. In the first two cases it was held by Jackson, J., that where a suit was filed for redemption of a kanom with an added prayer for a certain sum by way of damages, the proper valuation for court-fee and jurisdiction is the principal amount secured and not that amount plus the damages claimed. The basis of these decisions, however, was the terms of section 6 (3) of the Malabar Compensation for Tenants Improvement Act. The *ratio decidendi* was that the claim for damages from the point of view of payment of court-fee was in *pari materia* with compensation for improvements also covered by section 6 (3). It had previously been held by this Court that in a suit for redemption of a kanom, court-fee had not necessarily to be paid on the amount of compensation for improvements. These cases, therefore, are clearly distinguishable from the present case. In the other two cases, *Grandhi Pothanna* v. *Satyananda Charyulu*[3] and *Radhakrishna Chetti* v. *Teckla Schomberg*[4], it was held that the valuation put by the plaintiff on the relief for redemption covered a relief in regard to surplus profits as well, since the ascertainment of the amount payable by one party to the other, and prayers for surplus profits or accounts are merely incidental to the main relief. These cases also, it seems to me, are clearly distinguishable from the present case. Except to say that it was not known even on the date of the plaint whether one of the debts, a sum of Rs. 484-0-6 due to a certain Francis Pinto had been paid in full, the petitioner did not maintain that the debts for the payment of which the mortgage money or most of it had been retained had not been paid at all. He said that the delay in paying them had caused him "worry, inconvenience and ignominy and mental distress, apart from pecuniary loss"; and he assesses the damages to which he was entitled at Rs. 2,000. It seems to me impossible to say that a claim to an ascertained sum of damages to be set off against the amount otherwise due on the mortgage is a matter merely incidental to the ascertainment of the amount payable by one party to the other in a suit for redemption. A claim for surplus profits may well be regarded as merely incidental to the main relief; but a claim for damages for "worry, inconvenience and ignominy and mental distress" due to such reasons as arrest for debt and the institution of insolvency proceedings in consequence of the conduct of the respondent are of a different character altogether. The relief claimed is clearly a separate relief and the decision of the District Munsiff was correct.

The petition is, therefore, dismissed with costs.

B.V.V. — *Petition dismissed.*

1. (1925) 50 M.L.J. 493.
2. A.I.R. 1932 Mad. 217.
3. (1931) 60 M.L.J. 698.
4. (1940) 2 M.L.J. 867.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE BELL.

Bava Mohideen Rowther .. *Appellant**

v.

Pathuma Gani Ammal and others .. *Respondents.*

Res judicata—*Decree in terms of award—Regular appeal and revision petition to High Court—Dismissal—Decree final and matters covered by it cannot be re-agitated by fresh proceedings.*

A decree in terms of a compromise was passed in a suit, the compromise providing a reference to arbitration in the event of a dispute. A dispute having arisen there was a reference to arbitration and a decree was passed in terms of the award. A regular appeal and a revision petition were filed against the decree both of which were dismissed by the High Court on the grounds that no regular appeal lay and that there was no error in jurisdiction. An Original Petition was then filed in the lower Court seeking to re-agitate the matters.

Held, (i) that there was a final determination of the points raised which precluded the appellant from filing the Original Petition.

(ii) Where despite objection a wrong procedure is followed, or a jurisdiction is wrongly assumed the only remedy ordinarily available is to prefer an appeal against the decree, or, if no appeal lies, to prefer a revision petition, and the aggrieved party having done so and failed, the decree is final and binding on him.

Ghulam Khan v. *Muhammad Hassan*, (1901) 12 M.L.J. 77 : L.R. 29 I.A. 51 : I.L.R. 29 Cal. 167 (P.C.), explained.

Appeal against the order of the District Court, East Tanjore, at Negapatam, dated 17th February, 1944, in O. P. No. 72 of 1943.

K. V. Ramachandra Aiyar for Appellant.

S. Rangaswami Aiyangar for Respondents.

The Judgment of the Court was delivered by

Horwill, J.—This appeal has been filed against an order of the District Judge of East Tanjore dismissing an application purporting to be made under sections 30 and 31 of the Arbitration Act.

The dispute between the parties relates to the administration of a trust. In O. S. No. 18 of 1941 on the file of the District Judge of East Tanjore, a compromise was arrived at and a decree was passed in its terms. According to clause 13 of the compromise, there was a provision for reference to arbitration in the event of a dispute. A dispute did arise between the parties and a reference was made. An award was given and an application filed in the Court of the District Judge to pass a decree in terms of the award. The Court did so. The appellant then filed A. S. No. 449 of 1942, in this Court against the award and also C. R. P. No. 1702 of 1942. The regular appeal was dismissed on the ground that no appeal lay. The civil revision petition was dismissed on the ground that there was no error in the exercise of jurisdiction which warranted interference in revision. Having been unsuccessful in both his applications to this Court, the appellant then filed O. P. No. 72 of 1943 in the Court of the District Judge, the order on which is now under appeal. In that application he sought to re-agitate matters that had been raised in A. S. No. 449 of 1942 and C. R. P. No. 1702 of 1942. The Court held that they could not be gone into again and that the suit was too late, as it was filed long after the decree was passed.

It is argued here that time never began to run; for the time allowed for filing an application to set aside an award is 30 days from the serving of the notice, and no notice was ever given.

Whatever grounds of argument the appellant may have on the question of limitation, we are satisfied that he could not in O. P. No. 72 of 1943 re-agitate matters raised in A. S. No. 449 of 1942 and C. R. P. No. 1702 of 1942. Since A. S. No. 449 of 1942 was dismissed on the ground that no appeal lay, it was open to the appellant to raise the same questions in C. R. P. No. 1702 of 1942, and he did so;

* A. A. O. No. 409 of 1944. 13th December, 1946.

and since this Court held that his objections on the ground of the exercise of jurisdiction were groundless, there was a final determination on that point which precluded him from filing O. P. No. 72 of 1943. It is argued on the authority of *Ghulam Khan* v. *Muhammad Hassan*[1] a decision of the Privy Council, that a revision petition to this Court was incompetent. We do not however find that *Ghulam Khan* v. *Muhammad Hassan*[1], is an authority for that position. In that case, the question raised was whether, if the decision of the arbitrators on a point of law was wrong, the High Court could interfere in revision. Their Lordships pointed out that the matter was referred to the arbitrators and that their decision, right or wrong, was binding on the parties, that the Court was bound to pass a decree in terms of the award whatever its opinion might have been on the question of law, and that since that question could not be agitated by way of appeal, it would have been objectionable if the matter could have been raised in a revision petition. They held that a decree was rightly passed and binding on the parties. That decision has no application to the case here. If there were irregularities in the procedure of the District Judge, the appellant was certainly entitled to come to this Court, and if he could satisfy the Court that material irregularities in the exercise of the Court's jurisdiction had been committed which would justify this Court interfering in revision, to ask this Court to set aside the decree passed on the award. This Court considered the questions argued before it on the question of jurisdiction and held against the appellant. That matter therefore became conclusive between the parties.

It is further argued that since the proper procedure was not adopted, the decree was a nullity and can be ignored by the appellant. We do not agree that he can. When despite objection a wrong procedure is followed, or a jurisdiction is wrongly assumed, the only remedy ordinarily available is to prefer an appeal against the decree or, if no appeal lies, to prefer a revision petition to this Court. If the aggrieved party does not adopt one of these courses or if he does so and fails, then the decree is final and binding on him, whether there was any wrongful exercise of jurisdiction or not.

The appeal fails and is dismissed with costs.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE CLARK.

In the matter of *The Indian Companies Act* and In the matter of *S. S R. S. Nidhi, Ltd., Kumbakonam.*

The Official Liquidator .... *Applicant**

v.

N. Krishnaswami Iyengar and others .. *Respondents.*

Companies Act (*VII of* 1913), *section* 235 (1) (*as amended in* 1936)—*Application by official liquidator within three years of his appointment charging the respondent with misfeasance—Defence of limitation which would have been available if a suit had been filed by the company—If open.*

The words of limitation in section 235 (1) of the Companies Act must be regarded as governing all proceedings under the section and a defence of limitation, which might have been available to a person charged if a suit had been filed, will no longer be available to him.

Authorities discussed.

Benares Bank v. *Sri Prakasha*, A.I.R. 1946 All. 269, followed.

Travancore National and Quilon Bank, Ltd., In re, Application No. 2788 of 1941 in O. P. No. 158 of 1938, not followed.

R. Narasimhachari for Applicant.

K. V. Ramachandra Aiyar, T. R. Sundaram, R. Viswanathan, S. Thyagarajan, K. S. Desikan, K. S. Champakesa Aiyangar, S. Ramachandra Aiyar, N. Rajagopala Aiyangar, M. Seshachalapathi, C. R. Krishna Rao and *P. B. Singarachari* for 2 to 12 Respondents.

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1. (1901) 12 M.L.J. 77 : L.R. 29 I.A. 51 : I.L.R. 29 Cal. 167 (P.C.).

* Application No 2337 of 1944. 16th August, 1946.
(O. P. No. 202 of 1941.)

The Court delivered the following

JUDGMENT.—This is a petition by the liquidator under section 235 of the Act. The first respondent was the Managing Director of the Company and the 2nd to 10th respondents were Directors. The 11th respondent was the Company's auditor and the 12th respondent its head clerk. The first respondent is not appearing in these proceedings. He was adjudicated insolvent and the 13th respondent, who was the Official Receiver of his estate, was joined, but I am told that the insolvency has been annulled and accordingly the 13th respondent has no further interest in the matter.

The liquidator claims that large amounts are recoverable from the respondents for misfeasances consisting for the most part in their having granted loans contrary to the bye-laws of the Company. It is alleged that these loans, which are now, I understand, irrecoverable, were granted at the absolute discretion of the first respondent without any previous sanction by the Board and, accordingly, that the first respondent is primarily liable for these losses. It is claimed by the liquidator that the other Directors, the auditor and the head clerk, *i.e.*, the respondents now before me, were aware of these loans and were negligent in the performance of their duties in that they did not take steps to prevent them, or to recover the amounts so lent. In these circumstances, the case for the liquidator is that they are equally liable along with the first respondent. The winding up order was made on the 9th January, 1942, and it is common ground that the business of the Company was discontinued as from the 7th April, 1941.

Under the order of the Court there have been investigations into the conduct of the Managing Director and Directors of this Company and as it appeared that they had been guilty of offences relating to the Company, I directed the liquidator to refer the matter to the Registrar of Joint Stock Companies under section 237 of the Act. I understand that the first respondent is now being prosecuted by the police under the Indian Penal Code and that the question of taking action against him and the other Directors under the Indian Companies Act is still under consideration.

In these circumstances it is clearly impossible to proceed with the hearing of this petition on the merits. But as the respondents 2 to 12 inclusive contend that the relief now sought by the liquidator is barred by limitation, I have heard arguments on that point as a preliminary issue.

Under section 235 (1) the Court may grant relief on an application by the liquidator "made within three years from the date of the first appointment of a liquidator in winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer." Now the first appointment of a liquidator in the winding up was on the 19th November, 1941, when provisional liquidators were appointed and this application was presented on 8th November, 1944, and filed on the 14th November, 1944. Accordingly, the application is clearly within time; but it is urged on behalf of the respondents that this does not dispose of their contention. It is said that section 235 is a procedure section, which gives no new rights, but merely provides a summary mode of enforcing existing rights (vide *Narasimha Ayyangar* v. *Official Assignee of Madras*[1]) and accordingly that any defence of limitation which would have been open to the respondents if a suit had been filed by the Company, or by the Official Liquidator in its name under section 179 (*a*) of the Act is open to them in these proceedings. It is said that if a suit had been filed, the limitation applicable to these alleged misfeasances would have been that provided in Article 36 of the First Schedule to the Limitation Act and that in as much as the business was admittedly discontinued in 1941, the reliefs asked would accordingly have been barred. It is urged that as a suit would have been barred, the present proceedings must be barred also.

Apart from the words of limitation in section 235 (1), that sub-section is a verbatim reproduction of a provision in the English Companies Acts, which first appeared as section 165 of the Act of 1862.

1. (1930) 60 M.L.J. 280 : I.L.R. 54 Mad. 153.

In *Stringer's case*[1], the jurisdiction of the Court in summary proceedings under sections 165 and 101 (which corresponds to section 186 of our present Act) was considered and Selwyn, L.J., at page 484 of the report observed:

> "that in these summary proceedings every objection is just as open to the person sought to be charged as it would have been if a bill had been filed."

There have been many decisions in the English Courts on these two sections since *Stringer's case*[1] was decided, but so far as I am aware, it has never been doubted that a defence of limitation which would have been available in an action will be equally available in proceedings of that nature. Recently in *Hansraj Gupta* v. *Official Liquidators of Dehra Dun, etc., Company*[2], the Privy Council has laid down that this defence of limitation is open to a party charged under section 186 of our Act. But I am here concerned with section 235 of the Act, which has undergone certain changes since it was first enacted in India.

It will be convenient, I think, if I now set out the changes which have been made in this section. The section appeared as an exact copy of the English section in the Act of 1882. In the 1913 Act there was added to it a third sub-section as follows:

> "The Indian Limitation Act, 1908, shall apply to an application under this section as if such application were a suit."

In 1936, this sub-section (3) was deleted and the words of limitation now appearing in sub-section (1) were added.

The question I have to decide, therefore, is whether the addition in 1936 of the words of limitation to section 235 (1) excludes the right of a person charged, which formerly existed, to avail himself of a plea of limitation, which would have been open to him if a suit had been filed.

I had to consider this same point last year in the liquidation of the *Travancore National and Quilon Bank, Ltd.*[3] and I there answered the question in the negative. In that case, like the present, the application was filed within the period specified in sub-section (1) of section 235. I arrived at that decision largely on a literal interpretation of the section as it now stands and on what I considered to be a line of reasoning similar to that adopted by their Lordships of the Privy Council in *Hansraj Gupta* v. *Official Liquidators of Dehra Dun, etc., Company*[2]. But on a further consideration of the point and after hearing a very able argument by Mr. Narasimhachari, who appeared for the liquidator, I am satisfied that my decision in that case was erroneous. I am now satisfied that the question cannot properly be answered by a literal interpretation of section 235, but that due regard must be paid to the history of that section. Lindley, M.R., observed in In re *Mayfair Property Company*[4] as follows:

> "In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's case*[5] to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."

On this authority I am satisfied that it is not only proper, but necessary for me to consider the history of this section in our Statute Book, so that an interpretation may be given which accords with the apparent intention of the Legislature, as it may be gathered from that history.

Whilst, as I have already observed, the English Courts have throughout recognised that applications of this nature are subject to the same limitation as would be applied to suits for the same relief, this does not appear to have been the view generally accepted in India. Mr. Narasimhachari has drawn my attention to the authorities, one of this Court and one of the Allahabad High Court. In 1895 a bench of the Allahabad High Court (Edge, C.J. and Banerji, J.) held in *Connell* v. *The Himalaya Bank, Ltd.*[6], that proceedings under the section as it then stood were

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1. (1869) 4 Ch. Appeals 475.
2. (1932) 64 M.L.J. 403: L.R. 60 I.A. 13: I.L.R. 54 All. 1067 (P.C.).
3. Application No. 2788 of 1941 in O. P. No. 158 of 1938.
4. (1898) 2 Ch. 28 at 35.
5. (1584) 3 Co. Rep. 7 a.
6. (1895) I.L.R. 18 All. 12.

not subject to the periods of limitation prescribed by the Limitation Act. In that case it was suggested that Article 36 of the First Schedule would apply, but it was observed as follows at page 15 of the report :

"In our opinion Article 36 does not apply to this case. It may well be that the Legislature intended not to provide any limitation in cases in which Courts proceeded to enforce the provisions of section 214 of Act No. VI of 1882 (section 235 of the present Act). The provisions of that section could seldom be put in force if Article 36 of Schedule II of Act No. XV of 1877 applied. The misapplication or misfeasance of that section might not be discovered by the Court until after the lapse of two years from the date of the misapplication or misfeasance. It appears to us that there is good reason why directors, managers and officers of Companies registered under Act No. VI of 1882 should not be permitted to plead limitation so as to absolve them from making restitution of moneys misapplied or lost to the Company through their misfeasance. It may be that this is not exactly the same view of the law as that entertained by some of the Courts in England in cases under 53 and 54 Vic., Cap. 62, section 10. However, the Statute of Limitation which Judges in England have to apply to those cases is certainly wider in its wording than the articles of the Limitation Act which we have to apply in this country . . . . We hold that the proceedings in this case against the appellant under section 214 of Act No. VI of 1882 are not barred by limitation."

The case in this High Court was *Ramaswami* v. *Sreeramulu Chetti*[1]. That case was heard by a bench of this Court (Collins, C.J. and Parker, J.) in December, 1895. There is no reference to the decision in the Allahabad High Court and doubtless the report of that case was not available when the case in this Court was heard. Further it does not appear that the attention of the Court was drawn to the trend of the English authorities. Shepherd, J., on the Original Side had dismissed a claim under the section apparently on the ground that it was barred under Article 36. His decision was reversed on the ground that Article 36 had reference only to a suit and could not be applied in the case of an application. Accordingly, this decision, like that of the Allahabad High Court was that there was no period of limitation for an application under this section.

It is suggested that it was these decisions which led the Legislature in 1913 to add sub-section (3). The effect of that sub-section was to constitute an application under the section a "suit instituted" within the provision of section 3 of the Limitation Act, 1908. Thereafter, an application by a liquidator under this section was to be deemed, for the purpose of limitation, to be a suit and was subject to the law of limitation as such.

From 1913 when this sub-section was added until its removal in 1936, there were many and conflicting decisions of the Indian High Courts as to its application. It is, I think, unnecessary for me to refer to any particular one of those decisions. It will suffice if I say that, broadly speaking, the difference of opinion that emerged was as to the application, on the one hand, of Article 36 with its two year period of limitation and, on the other hand, Article 120 with its six year period from the date when the cause of action accrued. As to Article 120, there was a further difference of opinion as to the correct method of fixing the date on which the cause of action could be said to accrue in the case of the liquidator. In 1929 Sir Amberson Marten, C.J., observed in *Govind Narayan* v. *Ranganath Gopal*[2], which was a case under section 235 of the Act, at page 255 of the report, as follows :

"I would also like to add that in my opinion this appeal shows the desirability of some amendment of the Indian Companies Act, 1913, so as to nullify the existing difference of opinion in various High Courts as to the effect of section 235 of that Act. . . . . ."

Then in 1936, the Legislature removed sub-section (3) from the section and added the words of limitation to sub-section (1). In view of the difference of opinion expressed by the various High Courts, I cannot doubt that this amendment of the law by removing sub-section (3) must be regarded as displaying an intention on the part of the Legislature to put an end to controversy by removing such proceedings from the provisions of the Limitation Act. It may be said that the law was well settled and would have been the same even if sub-section (3) had never been added. That may be so, but the sub-section was added in 1913, and what had been only case-law until then, became statutory thereafter. Is it then to be supposed that when the Legislature removed the sub-section in 1936, its intention was merely

1. (1896) I.L.R. 19 Mad. 149. 2. (1929) I.L.R. 54 Bom. 226.

to go back to the old state of affairs? I cannot accept this. I am satisfied that the clear intention was to remove the application of the Limitation Act and, by the additions to sub-section (1), to impose, instead, a special period of limitation not merely for the application, but for proceedings under the section in their entirety.

Accordingly I hold that the words of limitation in section 235 (1) of the Act must be regarded as governing all proceedings under the section and that a defence of limitation, which might have been available to a person charged if a suit had been filed will no longer be open to him. This finding disposes of the contention raised by the respondents and it is unnecessary for me now to consider the further point, which I had to consider in the Travancore Bank case, *viz.*, which Article of the Limitation Act is to be applied.

A recent decision of the Allahabad High Court (*Braund and Wali Ullah, JJ.*) in *Benares Bank* v. *Sri Prakasha*[1] has been relied on before me for the liquidator. The view which I have arrived at is the same as that arrived at by the Allahabad High Court in that case.

Lastly, I think it desirable to state that my decision on this point of limitation must not be regarded as in any way qualifying the power of the Court in dealing with an application under this section. The section is permissive and it cannot necessarily follow that an order must always be passed when a case, which is filed within the specified period, is established. It will always be subject to the discretion of the Court when all matters relevant to the exercise of that discretion are before the Court. The case will accordingly be heard on the merits when the records are available. The costs of the hearing of this issue will be costs in the cause.

K.S. ——— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Tirumal Raju .. *Petitioner.**

Criminal Procedure Code (V of 1898), sections 439 (3) *and* 545—*Offence under section* 498, *Indian Penal Code—Sentence of imprisonment converted into fine by Court hearing appeal—Competency of Magistrate sitting in appeal to inflict fine higher than that leviable by the trial Court—Order for compensation by appellate Court levying fine for the first time—Legality.*

The petitioner was convicted under section 498, Indian Penal Code and sentenced to imprisonment for four months. The Joint Magistrate in appeal while confirming the conviction converted the sentence of imprisonment to a sentence of fine of Rs. 1,000, and further directed that out of the fine, Rs. 500 should be paid to P. W. 1 as compensation. On the questions whether an appellate Court imposing a sentence of fine for the first time could impose a punishment higher than what the Court of first instance can impose and whether a Court of appeal levying a sentence of fine for the first time could make an order under section 545, Criminal Procedure Code,

Held, (1) the lower appellate Court had no jurisdiction to levy a sentence of fine higher than what the Court of first instance could levy which was only to the extent of Rs. 200 being the maximum leviable in the case. But under section 439, sub-section (3) of the Criminal Procedure Code, the High Court as a Court of revision can inflict the same punishment which might have been inflicted by the First Class Magistrate.

(2) That section 545 of the Criminal Procedure Code empowers any Criminal Court which imposes any fine or any Criminal Court confirming in appeal that sentence of fine to make an order for compensation as contemplated in that section.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Joint Magistrate, Chandragiri, in C. A. No. 2 of 1946, dated 19th January, 1946 (C. C. No. 270 of 1945, Stationary Sub-Magistrate, Puttur).

V. T. Rangaswami Aiyangar for Petitioner.

V. Rajagopalachariar for P.W. 2.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

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1. A.I.R. 1946 All. 269.

* Crl. R. C. No. 642 of 1946. (Crl. R. P. No. 615 of 1946). 21st February, 1947.

The Court made the following

ORDER.—The petitioner was convicted by the Stationary Sub-Magistrate, Puttur, under section 498 of the Indian Penal Code and sentenced to rigorous imprisonment for four months. On appeal the Joint Magistrate, Chandragiri, while confirming the conviction converted the sentence of imprisonment to a fine of Rs. 1,000 and further directed that out of the fine, if collected, Rs. 500 should be paid to P. W. 1 by way of compensation under section 545 of the Code of Criminal Procedure. Both the Courts have found that inducement was offered to the wife of P. W. 1 before she was enticed by the petitioner from the house of her husband. It is in evidence that some time prior to the occurrence the petitioner told P. W. 1's wife " it is not possible to come and go like this, come along. I will take you and keep you as my concubine". This amounts to saying that he could not continue the liaison in the house of P. W. 1 any longer and that if she wanted to maintain the friendship she should agree to desert her husband's roof and go over to the petitioner and live with him and in that case he undertook to keep her as his mistress. I cannot conceive of a stronger inducement than this to amount to enticement.

The next contention raised is that the Joint Magistrate who for the first time levied a fine of Rs. 1,000 was not competent to do so as the appellate Court has no power to impose a punishment higher than what the Court of first instance can do. There is force in this contention and I agree that the Joint Magistrate should not have levied a higher fine than Rs. 200 which is the maximum fine that could have been imposed by the trial Court. But under sub-section (3) of section 439, this Court as a Court of revision can inflict the punishment which might have been inflicted by the First Class Magistrate. In exercise of the powers conferred under section 439, I impose a fine of Rs. 1,000 on the petitioner for the offence committed by him.

Lastly, with regard to the order made under section 545, it is contended that only the trial Court could make such an order or an appellate Court which dealt with the sentence of fine imposed by the trial Court and that an appellate Court which for the first time imposed a sentence of fine could not make such an order. This contention is altogether untenable. It empowers any Criminal Court which imposes a fine or any Criminal Court which confirms in appeal the sentence of fine to make the order contemplated in that section. I do not see any circumstantial explanation of the petitioner's crime. He was holding a responsible position as Village Munsiff and in that capacity played upon the confidence of an unsophisticated person, *viz.*, P. W. 1's wife. It is brought to my notice that on account of the overwhelming sense of humiliation, the husband has since died and the woman has borne an offspring to the petitioner.

The petition is dismissed. The conviction and sentence and the order under section 545 of the Code of Criminal Procedure are confirmed.

K.C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Pokuri Sivaramiah and another .. *Appellants**

v.

Vodde Audi Reddi (minor) and others .. *Respondents.*

Civil Procedure Code (V of 1908), sections 52 and 53—Decree against sons in a suit on a promissory note executed by father—Joint family assets in the hands of the sons—If can be proceeded against in execution.

A decree against the sons of a Hindu father in respect of a sum due on a promissory note executed by the father, passed against the assets of the father in the hands of his sons was sought to be executed under sections 52 and 53 of the Civil Procedure Code and it was contended by the sons that the father did not have any separate properties of his own and that the decree cannot be executed against the joint family properties.

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* A. A. A. O. No. 277 of 1945. 14th February, 1947.

Held, that a decree could be passed not only against the separate assets of the father in the hands of his sons but also against the share of the father in the joint family properties obtained by the sons by right of survivorship and the decree-holder was entitled to proceed against such properties.

Bhadri Venkatasami v. *Mandi Tata Reddi and another*, (1946) 2 M.L.J. 361 and *Krishnamurthi Ayyar* v. *Kailasam Ayyar*, (1947) 1 M.L.J. 183, followed.

Appeal against the order of the Court of the Subordinate Judge, Nellore, dated 20th April, 1945, in A. S. No. 270 of 1943 (E. P. No. 192 of 1942, District Munsiff Court, Kavali, in O. S. No. 80 of 1940, District Munsiff Court, Kanigiri).

P. S. Raghavarama Sastri for Appellants.

Kasturi Seshagiri Rao and *T. V. R. Tatachari* (Court Guardian) for Respondents.

The Court delivered the following

JUDGMENT.—The appellant is the decree-holder. He obtained a decree against the sons of a Hindu father in respect of a sum due on a promissory note executed by the father and endorsed over to the decree-holder. A decree was passed against the assets of the father now in the hands of his sons. The decree was sought to be executed under sections 52 and 53 of the Code of Civil Procedure and it was contended by the defendants that the father did not have any separate properties of his own and that the decree cannot be executed against the joint family properties. Under section 53 of the Code of Civil Procedure the property in the hands of an undivided Hindu son or other descendant which is liable under Hindu Law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be the property of the deceased which has come to the hands of the son or other descendant as his legal representative. The matter was considered in *Bhadri Venkatasami* v. *Mandi Tata Reddi and another*[1], by a Bench of this Court of which I happened to be a member. It was held that a decree can be passed not only against the separate assets of the father in the hands of his sons but also against the share of the father in the joint family properties obtained by the sons by right of survivorship. This decision is followed by Rajamannar, J., in *Krishnamurthi Ayyar* v. *Kailasam Ayyar* in C. R. P. No. 869 of 1945 on the file of this Court since reported[2], where he points out the effect of section 53 of the Code of Civil Procedure in respect of the claim made against the properties of a Hindu father obtained by right of survivorship by the son on the death of the father and holds that under the section the decree-holder is entitled to proceed against the joint family properties of the father obtained by his son by right of survivorship.

In these circumstances the order of the lower Court is set aside and the appeal allowed with costs throughout.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

Chodagiri Seshayya .. *Appellant**

v.

Alluri Venkataraju and others .. *Respondents.*

Hindu Law—Widow—Alienation—Income of property insufficient for maintaining herself and her daughter—Legal necessity—Absence of recital as to, in sale deed—Evidence aliundi*—Admissibility—Death of parties and witnesses and long lapse of time—Presumptions as to necessity to support the alienation—Permissibility.*

If an alienation by a Hindu widow had been questioned during the lifetime of all the parties concerned, in the absence of any recital in the sale deed that the property was being sold for legal necessity, evidence *aliundi* could have been given to show that legal necessity was present and was the reason for the sale. The same position must exist when all the parties are dead. Where an alienation is questioned after 50 years and there is evidence that the income was insufficient for the purpose of maintaining the widow and her daughter such evidence is conclusive that there was legal necessity and presumptions are permissible to fill in the details which have been obliterated by time.

1. (1946) 2 M.L.J. 361. 2. (1947) 1 M.L.J. 183.

* Appeal No. 377 of 1945. 6th February, 1947.

Appeal against the decree of the Court of the Subordinate Judge, Narasapur, dated 2nd April, 1945, in O. S. No. 63 of 1943.

G. Chandrasekhara Sastri for Appellant.

P. Somasundaram, P. Suryanarayana, S. Venugopala Rao and *P. Satyanarayana Raju* for Respondents.

The Court delivered the following

JUDGMENTS : *The Chief Justice.*—At some time prior to the year 1893, the exact date is unknown, one Chodagiri Bojjigadu died leaving a widow, Viri, and a daughter. At the time of his death he owned three items of immoveable property. The widow died about the year 1917. Prior to her death she had alienated those items of property and two other items which the Court below held were her stridhanam property. The daughter died in 1943. The plaintiff in the suit is the nephew of Bojjigadu and he claimed from the alienees or their successors all the five items of property on the ground that they formerly belonged to Bojjigadu and that the alienations were not binding upon him.

The plaintiff was unsuccessful in respect of all items of property and the present appeal was filed challenging the judgment of the learned Subordinate Judge of Narsapur before whom the suit came on for hearing and by whom it was decided. At the outset Mr. Chandrasekhara Sastri for the plaintiff-appellant informed us that he abandoned the appeal so far as items 1, 2, 4 and 5 were concerned and he proposed only to pursue the appeal in respect of item 3 which formerly belonged to Bojjigadu and which is now in the possession of the fourth defendant in the suit, the fourth respondent in the appeal before us. The sole ground upon which the decision of the lower Court is sought to be set aside is that the alienation was not for legal necessity, as was found by the learned Subordinate Judge.

The piece of property in question was sold by the widow by a deed dated the 1st January, 1893, for Rs. 130. In the deed of sale there is no recital or statement that the property was being sold for legal necessity ; the sole point made in the appeal is that since there is no such recital, the alienation could not have been for legal necessity and consequently the plaintiff should succeed in respect of his claim to item 3 and the decision of the Subordinate Judge should be reversed.

In the Court below evidence was given by three witnesses that the income or revenue from the five items of property was insufficient to maintain the widow and the daughter and, it would follow, that other income would be required in order that they should be able to keep themselves alive. The alienation took place more than 50 years ago. All the parties to the sale as well also, as witnesses and others whose names appear on the document are now dead. Had the deed been questioned during the lifetime of all the parties concerned, in the absence of any recital that the property was being sold for legal necessity, nevertheless evidence *aliundi* could have been given to show that legal necessity was present and was the reason for the sale. The same position must exist when all the parties are dead.

In *Venkata Reddi* v. *Rani Saheba of Wadhwan*[1], their Lordships of the Judicial Committee quoted with approval the observations of two learned Judges of this Court to the following effect :

> "It is not disputed that the onus lay upon the defendant to prove the necessity for the sale, but having regard to the great lapse of time since the transaction took place, that is, about 82 years, perhaps the highest on record, it will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question as in the case of alienations made at more or less recent dates. In such circumstances, presumptions are permissible to fill in the details which have been obliterated by time."

In the present case not only can the circumstances justify a presumption that the alienation was for a legal necessity, but there is direct evidence that legal necessity did exist. A widow is not bound to starve herself and preserve the estate which,

1. (1919) 38 M.L.J. 393 : L.R. 47 I.A. 6 : I.L.R. 43 Mad. 541 (P.C.).

on her death, will pass to some reversioner, in order that the estate in its entirety as received by the widow on the death of her husband might be available to the reversioner, if the income or revenue from the estate is insufficient to maintain her and, as in this case, her daughter. The widow can alienate property for the purpose of keeping herself and her daughter alive. When these circumstances exist, clearly there is legal necessity for sale of property. That is the position here. There was undisputed evidence, which was accepted by the Court below, that the income or revenue from the property left by the deceased was insufficient for the purpose of maintaining the widow and her daughter. Although there is no recital in the deed of sale that the property was sold for legal necessity, nevertheless the evidence, in my view, was conclusive that there was legal necessity.

In my view, this appeal must fail and the plaintiff must pay the costs of all the respondents one set each.

Rajamannar, J.—I agree.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CLARK.

In the matter of *The Ideal Studios, Ltd.* (*in liquidation*)

Gudipalli Sundararamiah .. *Petitioner.*

The Official Receiver, High Court, Madras .. *Applicant**

v.

Rao & Co. and others .. *Respondents.*

Companies Act (*VII of* 1913), *section* 228—*Company in liquidation turning out to be solvent—Surplus funds—Creditor whose debt does not carry interest—If entitled in winding up to payment of interest.*

Where a company in liquidation turns out to be solvent, a creditor of the company whose debt does not carry interest by agreement or otherwise, is not entitled in winding up to payment of interest on his debt.

Dehra Dun-Mussoorie Electric Tramway Co., Ltd., In re, (1933) I.L.R. 56 All. 423, dissented from.

Applicant in person.

S. V. Rama Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—This is an application by the Official Receiver as Official Liquidator for directions regarding the payment of interest to the creditors of the company and the amount to be paid to the contributories of the company.

When this application first came before me, I directed notice to issue to the creditors, as I desired to give them an opportunity of being heard on the application as regards the payment of interest. One creditor has appeared and is represented before me by counsel. This company is able to pay all its debts including in the case of those bearing interest, interest up to the date of payment. There is also sufficient to pay interest on the debts which do not carry interest, if such payment is permissible in law. The directions asked for by the Official Receiver are on this point and the question accordingly is whether a creditor of a company whose debt does not carry interest is, in any circumstances, entitled in winding up to payment of interest.

It has been held in England consistently since 1869 that, where a company in liquidation turns out to be solvent, creditors whose debts carry interest by agreement or otherwise, are entitled out of the surplus assets to payment of interest accruing after the commencement of the liquidation until payment is made. The doubt which the Official Receiver feels is as regards those creditors whose debts do not carry interest by agreement or otherwise and the creditor who is represented before me is a creditor of that class, his debt being an amount due in respect of professional services.

*Application No. 618 of 1946 in O. P. No. 3 of 1942. 25th March, 1946.

Section 228 of the Companies Act provides that all claims against a company, present or future, certain or contingent, shall be admissible to proof against the company " subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of insolvency." The following section (section 229) provides that " in the winding up of an insolvent company, the same rule shall prevail and be observed . . . . . and to debts provable . . . . . as are in force for the time being in the law of insolvency . . . . . ." The winding up of this company has arrived at a stage when it has been ascertained that the company is not insolvent and accordingly it seems to me that section 229 can have no application and the right of a creditor can only be that given to him under section 228. His proof of debt will be the same as it would have been, had it been a proof as between himself and the company. Apart altogether from liquidation proceedings, that would be a debt due to him with interest, if his contract allowed it or if he could establish that he was otherwise entitled to interest. He would be otherwise entitled, if he was entitled to interest under the terms of a decree or if he had become entitled by reason of a " demand " within the meaning of that expression in the Interest Act.

Only one case has been brought to my notice in which it was held that in circumstances like the present a creditor whose debt does not carry interest will be entitled to receive interest. That is In the matter of the *Dehra Dun-Mussoorie Electric Tramway Co., Ltd.*[1] In that case Young, J., held that when there was a surplus in the winding up of a company, the creditors are entitled to payment of interest from the date of the winding up until payment and that such interest is payable not only to the creditors whose debts carried interest but also to those in whose cases there was no contract for interest. In arriving at this decision, Young, J., stated that the point was covered by authority and quoted *Devi Dutta Mal* v. *Official Liquidator, Amritsar Bank, Ltd.*[2] That case is undoubtedly authority for the proposition that the creditors whose debts carry interest are entitled to claim interest up to the date of payment, but it furnishes no authority for the further proposition that creditors who are not so entitled by their contracts are similarly entitled. With the greatest possible respect, I find myself unable to agree with the decision arrived at in the Allahabad case. The view to the contrary is, I think, fully supported by the decisions of Lord Westbury in Ex parte *Greenwood*: Re *Hadfield's Patent Cask and Package Co., Ltd.*[3] of the Court of Appeal in In re *Humber Iron Works and Shipbuilding Co.*[4] and of Lord Romilly in In re *Herefordshire Banking Co.*[5] Lord Westbury's decision turned on a construction of the provision in the Company Law as then in force which is not contained in section 187 of our Act. The Lord Chancellor held that notwithstanding that there was a surplus, that surplus could not be applied towards payment of interest on a simple contract debt, which did not carry interest. Lord Romilly based his decision on the provision of the Company Law and followed Lord Westbury. After holding that the debt in question was one which did not carry interest, His Lordship observed :

" It cannot make the slightest difference whether there is a balance in the hands of the Official Liquidator, or whether a call is to be made. The question is, whether you are entitled to interest? If you are entitled to interest, I should make a call to pay it; but I am of opinion, you are not so entitled, and therefore, except upon all those debts which carry interest (and on those you must have interest according to the rate which they respectively carry according to the agreement between the parties), I must hold that you are not entitled to any interest."

In passing I may observe that His Lordship went on to express the view that a claim made in a winding up proceeding could not amount to a demand under the Statute 3 and 4 William IV, Chapter 42 (extended to India by the Interest Act XXXII of 1839). In In re *Humber Iron Works and Shipbuilding Co.*[4], Selwyn, L.J., at page 645 of the report said :

"In the present case we have to consider what are the positions of the creditors of the company, when, as here, there are some creditors who have a right to receive interest, and others having debts

1. (1933) I.L.R. 56 All. 423.
2. (1920) I.L.R. 1 Lah. 368.
3. 8 L.T.R. 846.
4. (1869) L.R. 4 Ch.Ap. 643 at 645.
5. (1867) 84 Eq. cases 250.

not bearing interest. In the first place, it appears to me that we must consider the case under two aspects—first, where there is and next where there is not, a surplus. I apprehend that in whatever manner the payments may have been made, whether originally they may have been made, in respect of capital or in respect of interest, still, inasmuch as they have all been paid in process of law, and without any contract or agreement between the parties the account must, in the event of there being an ultimate surplus, be taken as between the company and the creditors in the ordinary way."

and Giffard, L.J., at page 647 said :

"....... For these reasons I am of opinion that dividends ought to be paid on the debts as they stand at the date of the winding-up ; for when the estate is insolvent, this rule distributes the assets in the fairest way ; and where the estate is solvent, it works with equal fairness, because, as soon as it is ascertained that there is a surplus, the creditor whose debt carries interest is remitted to his rights under his contract ; and on the other hand, a creditor who has not stipulated for interest does not get it."

For these reasons, I hold that interest is payable up to the date of payment to those creditors, if any, whose debts carried interest, but that no interest should be paid to the creditors whose debts did not carry interest. I give that direction on the first point asked by the Official Receiver.

The second point on which directions are asked is as regards the rate of payment to the contributories. In a further report which the Official Receiver has filed, he states that he will be in a position to pay the contributories a return of their capital at the rate of 0-2-9 in the rupee in the event of my directing on the first point in the way in which I have directed. I accordingly direct the Official Receiver to make a return to the contributories at that rate, or at such rate as may prove possible when the final figures are drawn up.

As regards costs, the Official Receiver will of course be entitled to debit the company with the costs of this application. I think also in the circumstances it will be proper for the creditor who has appeared to have his costs. He did not come before the Court to urge that his client should receive interest. He came in response to the notice issued by the Official Receiver at my direction. That being so, I think it will be reasonable to order his costs to be paid out of the assets of the company. I fix these costs at Rs. 17-8-0. I do not consider that there is any need in this case for the Official Liquidator to append to the order the schedule or list referred to in rule 114 of the Companies Rules.

V.S. *Necessary directions given.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Malisetti Viranna and another .. *Appellants**

v.

Kondeparthi Pallayya .. *Respondent.*

Mortgage—Clog on equity of redemption—Agreement by mortgagor to sell property to mortgagee for agreed price—Enforceability.

The first defendant entered into an agreement with the plaintiff to sell the suit property to him for a sum of Rs. 1,300. A sum of Rs. 150 which had already been received by the first defendant under an arrangement that the plaintiff shall lend him a sum of Rs. 400 and enjoy the property for a 4½ years appropriating the income towards interest was treated as advance for the agreement to sell. The balance was to be paid at the time of registration. This agreement was superseded by a mortgage for Rs. 400 in favour of the plaintiff, by which the first defendant agreed that " if during the term of this mortgage, if I chose to sell the property I shall sell it to you for the price fixed between us deducting out of it the Rs. 400 now given to me." In a suit to enforce the agreement to sell, on the first defendant selling the property to the second defendant,

Held, that it was the agreement under the mortgage that had to be regarded as in force between the parties, even assuming that a right of pre-emption was conferred on the mortgagee it cannot be enforced as it serves as a clog on the equity of redemption—not directly but all the same pointedly. A term under which the mortgagor agrees, as part and parcel of the mortgage transaction, to sell to the mortgagee for a named price fetters the equity of redemption in the sense that when necessity arises for him to sell the property so that he can redeem the mortgage, he cannot sell except to the plaintiff and for the price named. This is prohibited by law.

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* A. A. O. No. 133 of 1946. 16th September, 1946.

Samuel v. *Jarrah Timber and Wood Paving Corporation*, (1904) A.C. 323; *Venkata Satyanarayana* v. *National Insurance Co., Ltd., Calcutta*, (1946) 2 M.L.J. 126, followed.

Ramaswami Pattar v. *Chinnan Asari*, (1901) 11 M.L.J. 132 : I.L.R. 24 Mad. 449, commented upon.

Appeal against the order of the District Court of West Godavari at Ellore, dated 5th February, 1945 (A. S. No. 50 of 1945) (O. S. No. 71 of 1944, District Munsiff Court, Kovvur).

B. V. Subramanian for Appellants.

P. Suryanarayana for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant entered into an agreement with the plaintiff on 29th May, 1942, to sell the suit property to him for a sum of Rs. 1,300. This agreement is Ex. P-1. A sum of Rs. 150, which had been already received by the first defendant under an arrangement that the plaintiff should lend the first defendant a sum of Rs. 400 and enjoy the property for four and a half years appropriating the income towards interest, was treated as the advance for the agreement to sell. The balance of consideration was to be paid at the time of the registration of the sale deed which was to be executed in a month. On 17th July, 1942, the first defendant executed a deed of mortgage in favour of the plaintiff, Ex. P-2, for a sum of Rs. 400 providing that the properties were to be enjoyed by the plaintiff for a period of five years (from Chitrabanu to the end of Vyaya) the income to be appropriated towards the interest. At the end of the period, if the principal sum was not paid the mortgage was to be renewed for another term of five years. Then follows the material clause with which we are concerned in this appeal and it is in these terms :

"If during the term of this mortgage, if I choose to sell the property, I shall sell it to you for the price already fixed between us, deducting out of it the Rs. 400 now given to me."

The sum of Rs. 400 was made up of Rs. 150 received as advance on the date of the agreement to sell, Rs. 80 received to cancel a mortgage arrangement made with third parties, and a sum of Rs. 170 lent on a promissory note.

The first defendant sold the property on 2nd September, 1943, under Exhibit D-1 to the second defendant for a sum of Rs. 2,500. The plaintiff has brought the suit to enforce the terms of Ex. P-1, the agreement to sell in his favour, alleging that the second defendant purchased the property with notice of the agreement. The District Munsiff held that Ex. P-1 was superseded by the mortgage Ex. P-2 and that there was no prohibition under the mortgage to sell the property to any one else. He dismissed the suit. On appeal, the District Judge concurred with the District Munsiff that the terms of the mortgage governed the rights of the parties ; but he held that there was a right of pre-emption conferred on the plaintiff which he could enforce. He remanded the suit for consideration of the other issue, namely,

"Whether the second defendant is a *bona fide* purchaser for valuable consideration without notice of the alleged agreement to sell and right of pre-emption in favour of plaintiff."

The defendants have preferred this appeal.

There can be no doubt that the agreement Ex. P-1 is not now in force after the mortgage Ex. P-2 in which it is definitely stated that the first defendant was then unwilling to sell the property in accordance with the agreement already entered into. The plaintiff was a consenting party and we must now look to the terms of the mortgage to ascertain their respective rights and obligations. There is nothing like a suspension of the operation of the agreement to sell which was to revive when the first defendant entertains once again an intention to sell. It is true that if he proposed to sell he was to sell for the sum fixed in the original agreement minus the sum of Rs. 400 received under the mortgage. But it is the agreement under the mortgage that has to be regarded as in force between the parties and not Ex. P-1 which was abandoned or superseded except for attracting the price specified therein.

Can a right of pre-emption conferred on the mortgagee under the mortgage be enforced ? Obviously not. It serves as a clog on the equity of redemption—not directly but all the same pointedly. The right is not extinguished in the sense

that there is a term that if the mortgage is not paid on the due date there is to be a conveyance for the amount due. Nor is there any condition that the mortgagor shall not redeem except on payment of something more than what is really due. Nevertheless a term under which the mortgagor agrees, as part and parcel of the mortgage transaction, to sell the property to the mortgagee for a named price fetters the equity in the sense that when necessity arises for him to sell the property so that he can redeem the mortgage, he cannot sell except to the plaintiff and for the price mentioned. This is prohibited by law. So long as there is the right conferred upon the mortgagee to enforce specific performance of the agreement to sell, it does not very much matter whether the option is that of the mortgagee or the mortgagor. It is unnecessary to cite any other authorities in support of this view than *Samuel* v. *Jarrah Timber and Wood Paving Corporation*[1], followed in *Venkata Satyanarayana* v. *National Insurance Co., Ltd., Calcutta*[2]. Though the rule prohibiting such a contract is founded more on sentiment than on principle, as pointed out by Lord Macnaghten in the English case, it was still held that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property. There is plenty of legal learning on the meaning of the rule, "once a mortgage always a mortgage," and the exceptions engrafted on it by decisions. But it is futile to contend against a strong current of decisions in force for nearly one and a half centuries, if not more. Lord Lindley points out at page 329 referring to *Reeve* v. *Lisle*[3], that the decision would not have been affirmed if the agreement to buy the equity of redemption had been one of the terms of the mortgage transaction itself.

The decision in *Ramaswami Pattar* v. *Chinnan Asari*[4], which appears to recognise the position that a mortgagee may stipulate for a right of pre-emption cannot be considered good law in view of the authorities referred to above. But it is useful in one respect, *viz.*, that the fixation of a price for the property on the basis of a sale or absolute conveyance can be regarded as oppressive or unconscionable and that it can be relieved against, even if the term does not of its own force operate as a clog on redemption.

For the reasons mentioned above, the appeal is allowed and the decree of the District Munsiff restored with costs right through.

No leave.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Londa Abbayee of Pithapuram .. *Petitioner**

v.

Badam Suryanarayana and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 51—Mandatory nature of the provisions of—Compliance with—Necessity—Circumstances.

In execution of a small cause decree, the petitioner, who is the judgment-debtor, was given notice to show cause why he should not be committed to prison. He appeared and filed a counter but was absent on the date to which the application was posted for disposal. The decree-holder was ordered to pay arrest batta and when that was done an order for arrest was issued. In pursuance of this order the judgment-debtor appeared before the Court and was released on his furnishing security to file an insolvency petition, and the execution petition was dismissed.

On a contention in revision against the order of arrest that there was a non-compliance with the mandatory provisions of section 51 of the Civil Procedure Code,

Held, that a recital of the reasons for ordering arrest of the judgment-debtor as required by the mandatory provisions of section 51 of the Civil Procedure Code was not necessary in the circumstances as the order eventually passed by the Court was not one that the judgment-debtor should be detained in a civil prison and that the judgment-debtor had nothing to complain of.

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1. (1904) A.C. 323.
2. (1946) 2 M.L.J. 126.
3. (1902) A.C. 461.
4. (1901) 11 M.L.J. 132: I.L.R. 24 Mad. 449.

* C. R. P. Nos. 30 and 31 of 1946. 17th July, 1946.

Petitions under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the orders of the Court of the Subordinate Judge, Cocanada, dated 6th October, 1945 and made in E. P. No. 218 of 1945 and dated 22nd October, 1945, and made in E. A. No. 686 of 1945, both the said E. P. No. and E. A. No. filed in S. C. S. No. 430 of 1933.

D. Narasaraju for Petitioner.

M. V. Nagaramayya for Respondents.

The Court delivered the following

JUDGMENT.—In execution of a Small Cause decree, the petitioner, who is the judgment-debtor, was given notice to show cause why he should not be committed to prison. He appeared and filed a counter; but on the date to which the application was posted for disposal he was absent. His objections were apparently read but overruled. The decree-holder was then ordered to pay arrest batta and when that was done, an order was issued for his arrest. In pursuance of that order he appeared before the Court; but he was released as he furnished security to file an insolvency petition. The execution petition was thereupon dismissed. The two civil revision petitions have been filed, one against the order of arrest and the other against the order overruling the petitioner's objections.

Order 21, rule 40 of the Code of Civil Procedure makes the procedure quite clear when a decree-holder is desirous to have the judgment-debtor committed to prison. In the first place, notice must go to him. Then if he fails to appear in answer to the notice, the Court may, if the decree-holder so wishes, order his arrest. He is then brought before the Court, which should take the evidence of the decree-holder in support of his application and give the judgment-debtor an opportunity of showing cause why he should not be committed to civil prison. Then under sub-rule (3), the Court may commit the judgment-debtor to detention in a civil prison subject to the provisions of section 51. Section 51 contains the mandatory provision that the judgment-debtor shall not be committed to prison unless the Court is satisfied for reasons recorded in writing that the judgment-debtor should be committed to prison for one of the five reasons set out in the section. Under rule 37 (2), where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor. In this case the judgment-debtor did appear in obedience to the notice, but failed to appear on the adjourned date when the matter came up for inquiry. If the Court had eventually ordered the detention of the judgment-debtor in prison as a result of overruling the judgment-debtor's objections, the order would have been open to the objection that the learned Subordinate Judge had not complied with the mandatory provisions of section 51; because before committing the judgment-debtor to a civil prison, the Court is bound to be satisfied that one of the clauses (*a*) to (*c*) of the proviso to section 51 makes the judgment-debtor liable to be detained in prison. But a recital of reasons is not necessary if the order eventually passed by the Court is not one that the judgment-debtor should be detained in a civil prison. As the learned Subordinate Judge accepted the undertaking of the petitioner to file an insolvency petition, he released him and dismissed the execution petition. So the judgment-debtor has nothing to complain of.

There is no need for me to attempt to anticipate what steps the learned Subordinate Judge will take if the judgment-debtor does not file an insolvency petition. If the present applications are intended to meet the contingency of a later order committing the judgment-debtor to jail, they are premature.

The petitions are dismissed with costs (one set).

V.P.S. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Mukkara Rudrappa Chetti .. *Appellant**

v.

The Karvetnagar Trust Estate, Tiruttani, by its executive officer G. Doraiswami Naidu .. *Respondent.*

Madras Estates Land Act (I of 1908) *sections* 3 (4) *and* 13 (3)—"*Improvement*"—*Requisites—Wells dug by the ryot in one holding for irrigating his holding in adjoining estate—Applicability of section* 13 (3) *—Practice—Second appeal—Interference on point taken* suo motu *by the Judge for the first time in second appeal and not raised at any stage by the parties.*

Any work which improves the value of the land for the time being is an improvement for the purposes of the Estates Land Act. Improvement does not mean something which must be of a permanent character. The digging of wells by a ryot in a holding with a view to irrigating an adjoining holding of his in another estate would constitute an improvement within the meaning of section 13 (3) of the Estates Land Act where the water has been so utilised and the ryot cannot be held liable to pay higher rate of rent on account of any change in the nature of the crop raised.

A Judge sitting in second appeal is not justified in deciding the second appeal on a point which has not been raised at any stage by the parties and which is taken by him *suo motu.*

Appeal under clause 15 of the Letters Patent against the decree of the Hon'ble Mr. Justice Byers, dated the 21st day of November, 1945, and passed in S. A. No. 185 of 1945 preferred to the High Court against the decree of the District Court of Chittoor in A. S. No. 140 of 1943, preferred against the decree of the Court of the Special Deputy Collector of Chandragiri Division in S. S. No. 3648 of 1942.

S. A. Seshadri Aiyangar for Appellant.

D. Narasaraju for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant is a ryot cultivating a holding in the Karvetnagar Trust Estate in Tiruttani. Originally the land was suitable only for the raising of dry crops. The appellant is the tenant of an adjoining holding, which is in another Estate. Some ten years ago, he dug two wells on the adjoining holding and with water obtained therefrom, he grew wet crops on his holding in the Karvetnagar Trust Estate. It is common ground that it is customary for tenants of lands in that Estate to pay rent according to the nature of the crop raised. When a dry crop is raised the rent is lower than when a wet crop is grown. In faslis 1349, 1350, and 1351 the appellant grew paddy and the executive officer of the Estate sought to charge him with the customary rent on such a crop. The appellant objected, but in a suit filed by the executive officer in the Revenue Court, a decree for the higher rent was passed. The appellant appealed to the District Judge of Chittoor, who held that as the construction of the two wells on the adjoining holding meant an improvement of the other holding, the landlord was not entitled to charge a higher rent, the case falling within section 13 (3) of the Madras Estates Land Act. The executive officer had suggested that the crop was raised from water supplied from a well belonging to the Estate, but this plea was not accepted by the District Judge. Consequently, the District Judge reduced the decretal amount in accordance with the rate charged for a superior dry crop. The Estate appealed to this Court. The appeal was heard by Byers, J., who allowed it on a point which had never been raised in the Courts below but was taken by him *suo motu.* The learned Judge considered that as the water came from the wells dug by the tenant on the adjoining holding it did not constitute an improvement within the meaning of section 13 (3).

We consider that the learned Judge was not justified in deciding the second appeal on a question which had not been raised at any stage by the parties. We go further and say that the learned Judge erred in holding that section 13 (3) did not apply. The section says :

* L. P. A. No. 2 of 1946. 13th March, 1946.

"(3) Notwithstanding any usage or contract to the contrary, the ryot shall not, by reason of his making an improvement at his expense, become liable to pay a higher rate of rent on account of any increase of production or of any change in the nature of the crop raised, as a consequence of such improvement."

Section 3 (4) gives the definition of the word "improvement." It means with reference to a ryot's holding any work which materially adds to the value of the holding, which is suitable to the holding and consistent with its character, and which, if not executed on the holding, is either executed directly for its benefit or after execution is made directly beneficial to it.

The evidence given by the appellant in the Revenue Court was that he had dug these two wells for the purpose of irrigating his holding in the Karvetnagar Trust Estate and it is manifest that he had utilised the water from these wells for this purpose. Therefore the wells constitute an improvement within the meaning of section 13 (3).

On behalf of the respondent it is said that the appellant can at any time, if he wishes, discontinue this supply. This may be so although it is not likely as the wells were dug for the purposes of this particular holding. To be an improvement within the meaning of the Act, does not mean something which must be of a permanent nature. Any work which improves the value of the land for the time being is an improvement and the digging of these two wells has improved the value. The decree of the District Judge should not have been disturbed. It is restored with costs here and before Byers, J.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR SIDNEY WADSWORTH, *Officiating Chief Justice* AND MR. JUSTICE RAJAMANNAR.

Messrs. M. Siddique and Company .. *Appellant**

v.

Mysore Textiles Agencies. .. *Respondent.*

Madras Yarn (Dealers) Control Order (1943)—Object and scope—Mere making of agreement to sell in future by person who had no licence required by order—Transaction, if illegal—Burden of proof as to illegality of transaction—"Sale"—When complete—Railway receipt—Nature of as to title to goods consigned—Sale of Goods Act (III of 1930), section 23—Scope—Cotton Cloth and Yarn (Contracts) Ordinance (1944), section 2—Not applicable where ceiling price was fixed after the completion of sale.

The Madras Yarn (Dealers) Control Order, 1943, is obviously designed to deal mainly with the physical storage and sale of goods within the Province. Therefore the mere making of an agreement to sell *in future* will not of itself be sufficient to bring the transaction within the mischief of the Order.

If a defendant (buyer) in a suit for recovery of damages on resale in respect of sale of yarn is unable to establish that there was a sale within the Province of Madras, the illegality of the transaction upon which the suit is based in that neither party had a licence in Madras under the Yarn (Dealers) Control Order, 1943, could not be made out. The burden lies upon the defendant to establish that the plaintiff's suit must fail because of the illegality of the transaction.

A sale would be completed by the delivery of the goods to the railway for purposes of transmitting them to the buyer, provided that the seller did not reserve a right of disposal. Thus, if the seller delivered the goods to the railway for conveyance to "self" there would not be such an appropriation as would pass title to the purchaser. In order to complete the transaction it would be necessary to endorse the railway receipt and deliver it to the buyer. If, on the other hand the railway receipt was made out to the buyer (himself) this would become a document of title vesting in the buyer alone the right of ownership in the goods while in transit. The mere fact that the document of title was retained in the custody of the seller, though it might give him some equitable lien over the goods, would not prevent the title from passing to the buyer.

In the absence of any evidence as to the nature of the railway receipt in respect of the goods consigned showing that the transaction was completed in Madras the defendant on whom the burden lies cannot be held to have established the illegality of the transaction. The mere fact that the plaintiff has a licence in Mysore could not authorise him to sell goods in the Madras Province.

Where the fixing of maximum prices under the Cotton Cloth and Yarn (Control) Order, 1943, was after the date on which the sale is alleged to have been completed, the Cotton Cloth and Yarn (Contracts) Ordinance (1944) will confer no benefit on the buyer who will not be entitled to the refund of any excess over the maximum price paid by him.

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* Appeal No. 515 of 1945. 12th September, 1946.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in O. S. No. 195 of 1943.

V. Ramaswami for Appellants.

V. C. Gopalaratnam and *L. V. Krishnaswami Aiyar* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant company was the defendant in a suit for damages for breach of contract for sale of yarn. Most of the facts are not in dispute. The plaintiff company has its office in Bangalore and works in conjunction with a mill in Cochin state. The defendant company has an office at Coimbatore. On the 14th May, 1943, under Ex. P-1 the plaintiff agreed to sell to the defendant 200 bales 40 s. of Cochin Egyptian Special D.H.X.C.R. yarn at a price of Rs. 49 per bundle of 10 lbs. ex-mill site, delivery July 1943, payment cash against goods or railway receipt. There was trouble between the parties about the performance of this contract and on the 31st July, 1943, the parties met at Coimbatore and entered into a fresh agreement, Ex P-1 (a) the relevant portion of which provides that the defendant withdraws all complaints regarding quality and count which have been raised so far and agrees to accept and take immediate delivery of 150 bales of yarn of the same description as originally accepted without any objection as to quality and count or ticket. The bales are to be despatched from " tomorrow " from Pudukad (which is in Cochin State) to Cochin harbour or Wadibunder as the case may be; and it is mutually agreed that the balance of the original contract should be treated as cancelled without liability on either side. In pursuance of this revised agreement 85 bales were despatched to the order of the defendant and delivery was taken without complaint. With reference to the remaining 65 bales, the defendant gave instructions for their despatch to Calcutta and on the 17th August, 1943, an invoice for these goods of the total price of Rs. 1,27,416-4-0 was tendered to the defendant's agent to Coimbatore by the agent of the plaintiff together with the railway receipt relating to the consignment of these goods from Pudakad to Calcutta. This railway receipt, unfortunately, is not in evidence and we do not know whether it was made out to " self " or to the consignee—a point which has a considerable bearing on the contentions in appeal. The defendant refused to take delivery, nominally because of a counter claim relating to another transaction. In the end the railway receipt was auctioned at the risk of the defendant and the goods were sold at the price of Rs. 26-8-0 per bale as compared with the contract price of Rs. 49. The plaintiff claimed damages measured by the difference between the contract price and the price fetched at the re-sale.

Various contentions were raised in the suit. We are now concerned with only two of these contentions, Firstly, a contention that the contract is illegal because neither the plaintiff nor the defendant had licences as required under the Madras Yarn (Dealers) Control Order, 1943, and secondly a contention that in any case the defendant is entitled to a rebate by reason of the subsequent fixing of the ceiling prices under the Cotton Cloth and Yarn (Control) Order, 1943, read along with the Cotton Cloth and Yarn (Contracts) Ordinance, 1944. It is common ground that although the plaintiff had a licence to deal in yarn issued by the Mysore Government and although the defendant had licences to deal in yarn issued by the Governments of Bombay and Calcutta, neither the plaintiff nor the defendant had a licence from the Government of Madras. The Madras Yarn (Dealers) Control Order, 1943, in terms extends to the whole of the Province of Madras. It defines " dealer " as " a person who sells or stores for sale yarn, whether wholesale or retail, whether on his own account or as a commission agent, and whether or not in conjunction with any other business, but it does not include a cotton spinning mill or its authorised agent selling on its behalf yarn produced by it." Clause 3 of the Order states that except as provided in clause 10 (which has no application here) no person shall carry on business as a dealer in this Province unless he has a licence issued under this order by the Provincial Textile Commissioner. Reading this clause along with the definition we may take it that it prohibits any unlicensed

person from either selling within the Province of Madras or storing for sale within the Province of Madras otherwise than as a proprietor or an authorised agent of a cotton spinning mill.

Now, it is not contended that the plaintiff was the proprietor or agent of a cotton spinning mill with reference to this transaction. The contract governing the transaction is the original contract, Ex. P-1 embodied in a document addressed from Bangalore, as modified by the subsequent agreement, Ex. P-1 (*a*) which was signed in Coimbatore. Neither of these contracts amounts to a completed sale. By section 4 (3) of the sale of Goods Act, where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter tobe fulfilled, the contract is called an agreement to sell. The passage of the property in the goods is controlled by section 23 of the Sale of Goods Act, which runs as follows:

"(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

The question is whether with reference to the terms of this section the sale of the goods which forms the subject of this suit was in the Province of Madras. If it was in the Province of Madras, then clearly the plaintiff must be deemed to have done business as a dealer in contravention of the Madras Yarn (Dealers) Control Order, 1943, and the transaction would be an illegal transaction which could not form the basis of an action for damages.

We do not think that the mere making of an agreement to sell *in futuro* within the Province of Madras would of itself be sufficient to bring the transaction within the mischief of the Madras Yarn (Dealers) Control Order, 1943. That order is obviously designed to deal mainly with the physical storage and sale of goods within the Province; and it has been contended before us that even if there was a sale within the Province, if the sale related to goods which were to be delivered outside the Province, it would not offend against the provisions of the Order. For the purpose of the present case it is unnecessary to decide this extreme contention one way or the other; but if the defendant is unable to establish that there was a sale within the Province, it seems to us that the illegality of the transaction upon which the suit is based could not be made out. Clearly the burden lies upon the defendant to establish that the plaintiff's suit must fail because of the illegality of the transaction.

Having regard to the terms of section 23 (2) of the Act, it must, we think, be held that the sale would be completed by the delivery of the goods to the railway for the purpose of transmitting them to the buyer, provided that the seller did not reserve the right of disposal. Translating this into the terms of ordinary commerce, if the seller delivered the goods to the railway for conveyance to "self" at Calcutta, there would not be such an appropriation as would pass title to the purchaser. In order to complete the transaction it would be necessary to endorse the railway receipt and deliver it to the buyer. If, on the other hand when this consignment was booked at the railway station in Cochin State the railway receipt was made out to the buyer, this would become a document of title vesting in the buyer alone the right of ownership in the goods while in transit. The mere fact that the document of title was retained in the custody of the seller, though it might give him some equitable lien over the goods, would not prevent the title from passing to the buyer.

The result therefore is that the question whether this sale was a sale in the Cochin State or a sale in the Province of Madras reduces itself to the question,

whether when the goods were consigned to the railway at Pudukad in Cochin State, they were consigned to the railway for transmission to the buyer unconditionally or whether they were consigned for transmission to the seller or some agent of his. This is a point upon which we have no evidence and as it is incumbent upon the defendant to prove the illegality of the contract, the defendant not having proved that the contract of sale was completed within the Province, we must hold that its illegality has not been established.

It is unnecessary to go at length into the further contention that the defendant would be entitled to a rebate having regard to the retrospective operation of the Cotton Cloth and Yarn (Contracts) Ordinance, 1944; section 2 of that Ordinance deals with the position when the contract for sale has taken place before the coming into force of the Cotton Cloth and Yarn (Control) Order, 1943, and delivery has taken place on or after the date of fixing the maximum price by an order under that provision. In such circumstances the buyer is entitled to the refund of any excess over the maximum price fixed under that order. Admittedly the fixing of the maximum price in the present case was after the date on which the sale is alleged to have been completed. This ordinance will therefore confer no benefit upon the defendant.

While therefore we do not agree with the grounds upon which the lower Court held the contract of sale not to be illegal and it seems to us clear that the mere fact that the plaintiff has a licence in Mysore could not authorise him to sell goods in the Madras Province, we dismiss the appeal with costs.

K.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Earamalla Sanjamma .. *Appellant**

v.

Anna Sayanna .. *Respondent.*

Madras Village Courts Act (I of 1889), sections 20-A and 73—Decision of Village Court—Finality—Concurrent jurisdiction of Civil Courts—Whether affected—Civil Procedure Code (1908), *Order* 21, *Rules* 90 *and* 92—*Fraud extraneous to conduct of sale—Applicability of rule* 92 (3).

Under the Madras Village Courts Act there is no express exclusion of the jurisdiction of the Civil Court. Nor is there any provision therein from which it can by necessary implication be inferred that the jurisdiction of the Civil Court is ousted. On the contrary, section 20-A has the effect of retaining the concurrent jurisdiction of the Civil Courts over the classes of cases which can be taken cognizance of by the Village Courts provided that it is open to the District Munsiff to transfer a case of a particular description of which he has taken competent cognizance, to the concerned Village Court. The word "final" in section 73 of the Act must be held to mean final only so far as the particular Court is concerned in which the decree was passed and will not altogether exclude the jurisdiction of the ordinary Civil Courts.

It is only where there is an allegation of material irregularity or fraud in publishing or conducting the sale that Order 21, rules 90 and 92, Civil Procedure Code, would come in for application. Where the allegation of fraud relates to a matter which has nothing to do with the publication or conduct of a sale, the bar provided by rule 92 (3) will not arise. The question whether the sale was brought about by the fraud of the decree-holder, the auction-purchaser and others and the question whether the decree itself was obtained by fraud are matters outside the scope of Order 21, rule 90.

Appeal against the decree of the District Court, Kurnool, in A. S. No. 11 of 1944, preferred against the decree of the Court of the District Munsiff, Markapur, in O. S. No. 423 of 1942.

M. Appa Rao for Appellant.

V. S. Narasimhachar for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. He owned a house which had been usufructuarily mortgaged to the second defendant for a sum of Rs. 170. A

* S. A. No. 1333 of 1945. 13th March, 1946.

suit for the recovery of a money debt was filed by the first defendant against the plaintiff in the Panchayat Court of Cumbum and a decree was obtained. The decree was transferred for execution to the District Munsiff's Court of Markapur as the house belonging to the judgment-debtor was situated within the territorial jurisdiction of that Court. In the execution sale held on the 16th October, 1942, in E. P. No. 28 of 1942 the mortgagee second defendant purchased the house subject to his own mortgage for a sum of Rs. 155. The plaintiff thereupon brought the suit out of which this appeal arises to set aside that Court sale on the ground that the decree was obtained by fraud and that there was also fraud in connection with the sale proceedings. The fraud that was alleged in connection with the decree was that although she had permanently left Cumbum and was residing in Markapur, the suit was filed in the Panchayat Court at Cumbum which had no jurisdiction to entertain the suit against her. With regard to the sale, the fraud that was alleged was that there had been an understanding between the first defendant and the plaintiff that the former should receive from the latter a sum of Rs. 50 in full satisfaction of the decree and it was in pursuance of that understanding that an application was made jointly by both to the Court on the 17th August, 1942, to which date E. P. No. 28 of 1942, had originally stood posted, to adjourn the sale for a period of two months in order to enable her to pay the said sum. The plaintiff's contention is that sometime prior to the 16th October, 1942, to which date the sale was posted the plaintiff paid a certain portion of the agreed sum to the first defendant and the first defendant agreed to give her some further time for the payment of the balance. He also undertook to see that the sale did not come off on the 16th October, 1942. Depending upon that assurance she did not attend the Court on the 16th October, 1942, and on that day the second defendant in collusion with the first defendant purchased the property in the Court auction which was held for Rs. 155 subject to his mortgage, and the sale was subsequently confirmed by the Court. She contends that the house is actually worth Rs. 600 and the sale was brought about as a result of fraudulent collusion between the two defendants against her. The first defendant in his written statement supported the plaintiff's case and stated that he had given a letter to the second defendant on the 15th October, 1942, to be delivered to his pleader to obtain a further adjournment of the sale and that that letter was fraudulently suppressed by the second defendant who, knowing all the circumstances, fraudulently purchased the property in his own name. The second defendant denied all these allegations and stated that there was no fraud either in connection with the decree or in connection with the sale. He alleged that there was collusion between the plaintiff and the first defendant and he also contended that the suit was not maintainable. Several issues were framed concerning the allegations of fraud and material irregularity with reference to the sale and concerning its legality. The third issue which was in the following effect: "Whether the suit to set aside the execution sale is maintainable in law" was tried by the trial Court as a preliminary issue and it was held that Order 21, rule 92 (3) of the Civil Procedure Code was a bar to the suit and that consequently it was not maintainable. The suit was dismissed by the trial Court and the learned District Judge on appeal agreed with the view taken by the trial Court, and hence this appeal.

The first objection with regard to the maintainability of the suit is based upon the bar provided in sub-rule (3) of Order 21, rule 92. Rule 90 provides for an application to set aside an execution sale on grounds of irregularity or fraud. Sub-rule (1) of rule 92 provides *inter alia* that where no application has been made under Order 21, rule 90, the Court shall make an order confirming the sale and thereupon the sale shall become absolute, and sub-rule (3) provides, "No suit to set aside an order made under this rule shall be brought by any person against whom such order is made." In the present case, admittedly, no application was made under Order 21, rule 90 and hence it is contended that sub-rule (3) precludes the institution of a suit to set aside an order made under rule 92 (1) confirming the sale. Before dealing with this question, I have to take note of the fact that in the course of the appeal before the learned District Judge it seems to have been conceded on behalf

of the plaintiff that Order 21, rule 92 (3) is a bar to the maintainability of the present suit and hence the learned Judge did not feel called upon to examine that question in any detail although at the end of his judgment he stated that on the facts he agreed with the learned District Munsiff that the suit was not maintainable in view of the provisions of Order 21, rule 92. Mr. Appa Rao is not making any such admission in this appeal, and being a question of law he contends that it is open to him to say that the admission made by the learned advocate for the plaintiff in the lower appellate Court is erroneous in law and is not binding. His argument is that it is only where there is an allegation of material irregularity or fraud in publishing or conducting a sale that Order 21, rules 90 and 92 would come in for application. But where the allegation of fraud relates to a matter which has nothing to do with the publication or conduct of a sale the bar provided by rule 92 (3) does not arise. The contention has to my mind to be upheld. The question whether the sale was brought about by the fraud of the decree-holder, the auction purchaser and others and the question whether the decree itself was obtained by fraud are matters outside the scope of Order 21, rule 90. (Vide *Khagendranath Mahata* v. *Pran Nath Roy*[1] and *Bhagwan Das Marwari* v. *Suraj Prasad Singh*[2]). The learned District Judge has in this connection particularly referred to the conduct of the plaintiff in acquiescing in the decree which she is deemed to have done by reason of the joint application made by her on the 17th August, 1942, for the adjournment of the sale on the same proclamation. If it is treated as a matter from which some sort of estoppel arises, then there should be a specific pleading with regard to that matter and on a properly raised issue the plea will have to be investigated as one of fact. From the mere circumstance that the plaintiff was a party to an application for an adjournment of the sale, an inference cannot be drawn that she acquiesced in the correctness and validity and the binding nature of the entire decree. Her own case is that she made the application because, even though the decree was obtained by fraud, she was willing to settle the matter at a sum of Rs. 50 in full satisfaction and that the first defendant had agreed to the same, but after having done so and having obtained from her a portion of the amount he colluded with the second defendant and made her keep away from the sale with the result that the second defendant purchased the entire property for a grossly low price. That case has not been investigated at all, and without doing so, to infer from the mere filing of the application that she had acquiesced in the validity and legality of the decree is, to say the least, unreasonable and unjust. That question will therefore have to be left open for being duly tried in the course of the trial of the suit.

Although the second ground upon which the learned District Judge has based his judgment was not raised at the trial stage before the District Munsiff, the learned District Judge has examined the case from a new and different standpoint. He held on a scrutiny of the provisions of the Madras Village Courts Act that the suit itself would not lie in a Civil Court in view of the provisions of section 73 of that Act. Section 73 of the Village Courts Act provides for the revision by the District Munsiff in certain cases of the proceedings of a Village Court. In cases where the Panchayat Court has exercised jurisdiction not vested in it by law or otherwise acted illegally or with material irregularity the District Munsiff, may, on a petition being presented within sixty days from the date of the decree by the aggrieved party, set aside such a decree. Then comes the following provision in that section : "except as provided in this section, every decree or order of a Village Court shall be final." The learned District Judge points out that no such petition having been filed to revise the decree before the District Munsiff within sixty days, it was not open to her to file a suit in the District Munsiff's Court to set aside the decree. This raises an important question, *viz.*, whether a provision in a statute of this kind has the effect of ousting the jurisdiction of a Civil Court and making the decree of the Panchayat Court final in the sense that no remedy is available in any other forum. The learned District Judge has not examined the question but was content with acting upon

1. (1902) L.R. 29 I.A. 99 : I.L.R. 29 Cal. 395 (P.C.).
2. (1924) I.L.R. 47 All. 217.

his reading of the bare section 73 of the Village Courts Act without regard to the scheme of the entire enactment. That scheme and the effect of the decisions bearing upon the subject however point to a different conclusion. A number of cases have been cited, but it would be sufficient to deal with some of the recent and leading cases touching the question. In *Secretary of State for India* v. *Mask and Co.*[1], a question arose before the Privy Council whether a decision by an Assistant Collector on the duty leviable on imported goods is a decision within the meaning of section 188 of the Sea Customs Act and whether, when the right of revision therefrom conferred by section 191 has been exercised and an order under that section was made, the order was final and the jurisdiction of the Civil Court was excluded. Their Lordships held upon a construction of the Act and the various sections thereof that the order in that case had the effect of ousting the jurisdiction of the Civil Courts. The general principle was stated to be that the determination of such a question must rest on the terms of the particular statute which was under consideration and decisions on other statutory provisions were not of material assistance except in so far as the general principles of construction were laid down. Then their Lordships adverted with approval to the well known judgment of Willes, J., in *Wolverhampton New Water Works* v. *Hawkesford*[2], which was approved by the House of Lords in *Neville* v. *London "Express" Newspapers Ltd.*[3] With reference to those cases it was pointed out that the question was, whether the case before the Privy Council fell under the third class stated by Willes, J., *viz.*,

> "Where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it . . . . . . with respect to that class it has always been held that the party must adopt the form of remedy given by the statute."

Their Lordships then proceed to say this :

> "It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

The same principle has been put by Varadachariar, J., in *Kamaraja Pandia Naicker* v. *Secretary of State for India in Council*[4], in these terms :

> "The ordinary rule is that where a person's liberty or property is interfered with, under colour of statutory powers, he has a cause of action which the Civil Courts are bound to entertain unless a bar to such entertainment has been enacted expressly or at least by necessary implication. Where there is no question of a common law right and an infringement thereof, the position may be different, for in such cases, the ordinary Courts had *prima facie* no jurisdiction and therefore there is no question of any ouster of their jurisdiction. Decisions like *Bhaishankar* v. *The Municipal Council, Corporation of Bombay*[5], and *Nataraja Mudaliar* v. *Municipal Council of Mayavaram*[6] fall under this category, where the right or status was itself the creation of the statute. Even where rights of property are involved, the Legislature may point to particular modes of redress. But in dealing with this class of cases, a distinction has to be borne in mind between the general right of resort to the Civil Court and any particular form of procedure in seeking the aid of the Civil Court. So long as a statute provides for a decision by a Civil Court, it is immaterial, whether the Civil Court is approached by means of a suit or by an appeal or petition. This is the basis of the decision in *Ramachandra* v. *Secretary of State*[7] as explained in *Balwant Ramachandra* v. *Secretary of State*[8]. The decision in *Ishwarananda Bharati Swami* v. *Commissioners, Hindu Religious Endowments Board, Madras*[9], is also explicable on the same ground."

This decision and the line of reasoning adopted by the learned Judge was approved with particular reference to the Privy Council decision in *Secretary of State for India* v. *Mask and Co.*[1] by a Full Bench of this Court in *Secretary of State for India* v. *Jagannadhan*[10]. That was a case that arose under the Surcharge Audit and Disallowance Rules framed under the Madras Local Boards Act, and the question before the Full Bench was whether the Secretary of State was precluded from raising in the

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1. (1940) 2 M.L.J. 140 : L.R. 67 I.A. 222: I.L.R. (1940) Mad. 599 (P.C.).
2. (1859) 6 C.B. (N.S.) 336, 356 : 141 E.R. 486.
3. (1919) A.C. 368.
4. (1934) 69 M.L.J. 695 at page 700.
5. (1907) I.L.R. 31 Bom. 604.
6. (1911) I.L.R. 36 Mad. 120 : 21 M.L.J. 878.
7. (1886) I.L.R. 12 Mad. 105.
8. (1905) I.L.R. 29 Bom. 480 at 509.
9. (1931) 61 M.L.J. 117 : I.L.R. 54 Mad. 928.
10. (1941) 2 M.L.J. 47 : I.L.R. 1941 Mad. 850 (F.B.).

High Court the question whether the Civil Court had no jurisdiction to entertain the suit as there was no appeal against the order of remand. The Full Bench held *inter alia* that in order to exclude the jurisdiction of the Civil Courts the exclusion must be explicitly expressed or clearly implied, and on the facts of the case before the Bench it was found that there was a clear case of implied exclusion of the right to file a suit. A contention was raised by the Government Pleader in that case that the Civil Court had no jurisdiction to entertain the suit relying on *Ramachandra* v. *Secretary of State*[1], *Iswarananda Bharathiswami* v. *Commissioners, Hindu Religious Endowments Board, Madras*[2], *Subbayya* v. *Thippa Reddi*[3], and the judgment of the Privy Council in *Secretary of State* v. *Mask and Co.*[4]. The learned Judges, after a detailed examination of those cases, refer to the decision of Varadachariar, J., in *Kamaraja Pandia Naicker* v. *Secretary of State for India in Council*[5] and the Privy Council decision in *Secretary of State for India* v. *Mask and Co.*[4] and with reference to the latter say :

> " There Lord Thankerton in delivering the judgment of the Board said that it is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred. The exclusion must either be explicitly expressed or clearly implied and approval was expressed of the dictum of Willes, J., in *Wolverhampton Waterworks Co.* v. *Hawkesford*[6], that where a statute creates a liability not existing at Common Law, and gives also a particular remedy for enforcing it, the party must adopt the form of remedy given by the statute."

Then the learned Judges summarise the position in these words :

> " Therefore, we have here two principles clearly established. The first is that, to exclude the jurisdiction of the Civil Courts, the exclusion must be explicitly expressed or clearly implied. The second is that, where the liability is statutory as opposed to liability under the Common Law, the party must adopt the remedy given to him by the statute. I cannot imagine a clearer case of implied exclusion of the right to file a suit than we have here."

This view was subsequently followed by a Division Bench of this Court recently in *Sri Kothandaramaswami Temple* v. *Veezhinatha Aiyar*[7], which was a case that arose under section 44 of the Madras Hindu Religious Endowments Act. It was in that case found that section 44 did not preclude the trustees from filing a suit in a Civil Court and that the section merely permitted the District Judge on an application to order the recovery of the amount charged and that did not in itself mean that the trustee of a temple benefited by the charge was compelled to proceed under that section. The section did not expressly exclude the right of a suit nor could it be read as implying its exclusion.

These being the tests and principles laid down in the various decisions, we have to examine the Village Courts Act to see whether by reason of section 73 of that Act the jurisdiction of the Civil Courts is excluded with regard to suits or remedies which are ordinarily cognizable by a Village Court. Section 13 lays down the classes of suits of which the Village Courts can take cognizance and of which those Courts cannot take cognizance, and section 14 lays down the conditions upon which the jurisdiction of the Court arises. We then have section 20-A which runs thus :

> " (1) If a suit which is triable by a village Court is instituted in the Court of a District Munsiff, he may, unless sufficient reasons exist to the contrary, transfer it to the village Court.
>
> (2) Where a District Munsiff tries a suit which is triable by a village Court and is of opinion that the suit ought to have been instituted in the village Court, no costs shall be allowed to a successful plaintiff and a successful defendant shall be allowed his costs as between pleader and client."

Then we have section 73 which provides for a revision by the District Munsiff of any decree made by a Village Court and the provision therein that every decree and order of a Village Court shall be final except as provided in that section. To start with, it has to be pointed out that in this Act there is no express exclusion of the jurisdiction of the Civil Court. Nor is there any provision therein from which it can by necessary implication be inferred that the jurisdiction of the Civil Courts is ousted. On the contrary section 20-A appears to have the effect of retaining the concurrent jurisdiction of the Civil Courts over the classes of cases which can be taken

1. (1886) I.L.R. 12 Mad. 105.
2. (1931) 61 M.L.J. 117 : I.L.R. 54 Mad. 928.
3. (1939) 2 M.L.J. 604.
4. (1940) 2 M.L.J. 140 : L.R. 67 I.A. 222 : I.L.R. (1940) Mad. 599.
5. (1934) 69 M.L.J. 695.
6. (1859) 6 C.B. (N.S.) 336 : 141 E.R. 486.
7. (1945) 1 M.L.J. 63 : I.L.R. (1945) Mad. 553.

cognizance of by the Village Courts provided that it is open to the District Munsiff to transfer a case of a particular description of which he has taken competent cognizance, to the concerned Village Court. A kind of penalty has been attached under clause (2) of section 20-A that if a suit triable by a Village Court is tried by the District Munsiff, it is open to him in certain cases to deprive that party who ultimately succeeds of the costs in view of the consideration that the party could have lessened the costs of the other side by instituting the action in the Village Court instead of in a Civil Court. Thus it is clear that the common law remedy is kept alive and that the jurisdiction of the Court is not only not excluded, but by clear implication retained. Further, it is not a case where the obligation is created by the statute, because it is only in cases where the statute itself creates an obligation and provides an exclusive code for its determination that the jurisdiction of the Civil Court can be said to be ousted. Having regard to these considerations I must hold that the view taken by the learned District Judge with reference to section 73 of the Village Courts Act is not correct. The learned Advocate for the second respondent auction-purchaser drew my attention to the case reported in *Ramanatha* v. *Arunachala*[1] where with reference to section 43 of the Hindu Religious Endowments Act the scope and meaning of the word "final" fell to be interpreted. It was held that it was final to the extent even of excluding the right of an office holder or a servant of a temple to challenge the decision in a Court of law. The decision proceeds entirely upon the interpretation of that word in the context in which it occurs in other sections of the Act, *viz.*, sections 53 and 54, and since in those sections the only possible meaning is the meaning that the learned Judges put, it was held that the same meaning should be given to the same word occurring in section 43. In that case also the rule as enunciated by Varadachariar, J., in *Kamaraja Pandia Naicker* v. *Secretary of State for India in Council*[2] was adverted to. But with reference to the particular language of the provision before them the learned Judges arrived in application of that principle at the result already mentioned. Here the word "final" appearing in section 73 must be held to mean final so far as the particular Court is concerned in which the decree was passed and cannot be held to extend to the exclusion of the jurisdiction of the ordinary Civil Courts.

The result is that this appeal is allowed and the decree of the lower appellate Court is set aside as also the finding of the Courts below on issue 3. That issue is found in favour of the plaintiff. But it must be strictly understood as confined to the two particular objections regarding maintainability that have been examined and decided here. The learned advocate for the second respondent says that he has some other objection to raise on the basis of section 47 of the Code of Civil Procedure. I do not have the written statement of the second respondent before me. It will be a matter for the trial Court to consider if and when any further objections to the maintainability are raised whether those objections can be entertained and if so to adjudicate the same on their own merits. All other questions in the suit except those decided here are left open. Subject to these directions, the suit is restored to the file of the District Munsiff of Markapur for disposal according to law. The appellant will get his costs in this Court. The costs in the Courts below will abide the result of the suit. The Court fee paid on the memorandum of appeal will be refunded.

No leave.

B.V.V. *Appeal allowed.*

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1. (1940) 1 M.L.J. 352 : I.L.R. (1940) Mad. 825.
2. (1934) 69 M.L.J. 695.

[FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Fort William in Bengal).

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR MUHAMMAD ZAFRULLA KHAN AND H. J. KANIA, JJ.

Maharajadhiraj Uday Chand Mahtab of Burdwan .. *Appellant** (in both appeals).

v.

Minor Samarendra Nath Mitra and others .. *Respondents*, (in both appeals).

Intervener : The Advocate-General of Bengal.

Bengal Tenancy Act (*VIII of* 1885, *as amended in* 1940), *section* 168-A *and Government of India Act* (1935), *schedule VII, List II, Entries* 2 *and* 21 *and List III, Entry No.* 4—*Section* 168-A *of the Bengal Tenancy Act, if* ultra vires *the Province of Bengal—Nature of legislation covered by Entry No.* 21 *in List II—Scope of section* 168-A *of the Bengal Tenancy Act—If covered by Entries Nos.* 2 *and* 21 *of List II—Impugned section if in conflict with Entry No.* 4 *of List III—Extent of applicability of the Civil Procedure Code to decrees under the Bengal Tenancy Act—Decrees to which section* 168-A *of the Bengal Tenancy Act applies—Applicability of the Bengal Tenancy Act after the termination of the relationship of landlord and tenant.*

On a contention that section 168-A of the Bengal Tenancy Act was *ultra vires* the Province of Bengal as it directed that a decree for arrears of rent due in respect of a tenure or holding shall not be executed by the attachment and sale of any moveable or immoveable property other than the entire tenure or holding to which the decree related, and was not covered by Entry No. 21 or No. 21 read with Entry No. 2 of List II of Schedule VII of the Constitution Act, and further was in conflict with Entry No. 4 of List III of the same schedule,

Held:—The words of Entry No. 21 of List II of the seventh schedule to the Constitution Act clearly cover legislation in respect of rights in or over land and include the relation of landlord and tenant and the collection of rents. Section 168-A of the Bengal Tenancy Act is clearly a piece of legislation in respect of the right of a landlord and tenant with regard to rent which had accrued due in respect of the property let to the tenant and is therefore clearly covered by the words of Entry No. 21. Further, as the collection of rents is covered by Entry No. 21, the jurisdiction and powers of the Courts in respect of the collection of rents is covered by Entry No. 2 in the same list. As section 168-A of the Bengal Tenancy Act clearly deals with the powers and jurisdiction of the Court to get money paid to a decree-holder in respect of his decree for arrears of rents of agricultural lands, it is also covered by Entry No. 2 in List II.

It cannot be said that section 168-A of the Bengal Tenancy Act is in conflict with Entry No. 4 of List III in that it restricted or affected the right of the decree-holder to have his decree executed as provided in section 51 of the Civil Procedure Code. The Civil Procedure Code is made applicable to decrees passed under the Bengal Tenancy Act only because of section 143 of that Act; that section while making provision for its application also provides in sub-section (2) that the Civil Procedure Code shall apply only subject to the provisions of the Bengal Tenancy Act and section 168-A being a valid piece of legislation, the Civil Procedure Code can apply only subject to its provisions.

Section 168-A of the Bengal Tenancy Act would be applicable when a decree is for arrears of rent, whether having the effect of a rent decree or money decree.

The contention that no provision of the Bengal Tenancy Act can apply after the relation of landlord and tenant had ceased to exist is unsustainable.

Dr. N. C. Sen Gupta, Senior Advocate, Federal Court (*Samarendra Nath Mukherji*, Advocate, Federal Court and *Purushottam Chatterjee*, Advocate, Calcutta High Court, with him) instructed by *Ranjit Singh Narula*, Agent, for Appellant in both the appeals.

B. Banerji, Advocate, Federal Court, (*Hemendra Chandra Sen*, Advocate, Calcutta High Court, with him) instructed by *P. K. Bose*, Agent, for Respondents Nos. 4 and 5 (*viz.*, Minors Ajit Kumar Roy and Ashotosh Roy) in both the appeals.

Rama Prosad Mukherji, Senior Advocate, Federal Court, (*Nirmal Kumar Sen*, Advocate, Federal Court, with him) instructed by *P. K. Bose*, Agent, for the Intervener in both the appeals.

[RESPONDENTS NOS. 1, 2, 3, 6 AND 7 HAVE NOT ENTERED APPEARANCE].

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*Civil Appeals Nos. V and VI of 1945. 4th January, 1947.

The Judgment of the Court was delivered by

KANIA, J.—These two appeals are from a judgment of a Division Bench of the High Court at Calcutta and raise the question of the validity of section 168-A of the Bengal Tenancy Act as amended by the Act of 1940.

The relevant facts are these. The appellant in both the appeals is a big zamindar. The respondents held a *putni* as tenants under the appellant. The rents due in respect of this *putni* were in arrears for many years and on the 15th May 1936, the *putni* was put up to sale under the provisions of Regulation VIII of 1819 for recovery of the rent due for the last *kist* of 1342 B.S. (1935-36) and it was purchased by a stranger. For recovery of the rent due in respect of the years 1339-41 B.S. (1932—35) and the first *kist* of 1342 B.S. (1935-36), the landlord instituted a suit being Rent Suit No. 2 of 1937 in the court of the Subordinate Judge at Hooghly and obtained a decree for Rs. 56,000 and odd on the 25th February, 1938. Attempts were made to execute the decree between 1938 and 1940 and some amounts were recovered from the judgment-debtor. The appellant then started execution proceedings on the 25th September, 1940, in the Court of the Second Subordinate Judge of 24-Parganas, as the decree was transmitted there for execution. The decree-holder applied for recovery of the balance by attachment and sale of certain immoveable properties belonging to the judgment-debtors, other than what was given as a *putni* to the debtors, and certain immoveable properties were attached. Objections were taken to this by judgment-debtors 4 and 5 in one case and the Official Receiver in the other, and they gave rise to Miscellaneous Cases Nos. 24 and 40 of 1941. The appeals are from the decision of the High Court in these two cases.

The contention of both sets of judgment-debtors in substance was that the appellant was not entitled to proceed against any other moveable or immoveable properties of the judgment-debtors because of section 168-A of the Bengal Tenancy Act. The Subordinate Judge, before whom the case first came for disposal, upheld the objections and dismissed the application for execution. An appeal preferred to the High Court also failed but the Court granted a certificate under section 205 of the Government of India Act, 1935, and the appellant has thereupon brought this appeal to this Court.

On behalf of the appellant, it was contended that section 168-A was *ultra vires* the Province of Bengal, because it was not covered by Entry No. 21 or No. 21 read with Entry No. 2 of List II of Schedule VII of the Constitution Act. In the alternative it was argued that it came in conflict with Entry No. 4 of List III of the same Schedule. The second line of argument was that the decree was not for arrears of rent; it was a money decree and the provisions of the Bengal Tenancy Act did not apply to the enforcement of the decree at all. It was argued that therefore section 168-A of the Bengal Tenancy Act had no application to the facts here. These points were urged before the lower Courts, but without success.

It is common ground that the lands given under the *putni* tenure were agricultural lands. Entry No. 21 in List II of Schedule VII runs as follows :—

> "Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant and the collection of rents, transfer, alienation and devolution of agricultural land, land improvement and agricultural loans, colonization, Court of Wards; encumbered and attached estates; treasure trove."

Entry No. 2 in the same List runs as follows :—

> "Jurisdiction and powers of all Courts except the Federal Court with respect to any of the matters in this List; procedure in Rent and Revenue Courts."

Section 168-A of the Bengal Tenancy Act runs as follows :—

> "(1) Notwithstanding anything contained elsewhere in this Act, or in any other law, or in any contract—
>
> (a) a decree for arrears of rent due in respect of a tenure or holding, whether having the effect of a rent decree or money decree, or a certificate for such arrears signed under the Bengal Public Demands Recovery Act, 1913, shall not be executed by the attachment and sale of any moveable

or immoveable property other than the entire tenure or holding to which the decree or certificate relates:

Provided that the provisions of this clause shall not apply, if, in any manner other than by surrender of the tenure or holding, the term of the tenancy expires before an application is made for the execution of such a decree or certificate;

(*b*) the purchaser at a sale referred to in clause (*a*) shall be liable to pay to the decree-holder or certificate-holder the deficiency, if any, between the purchase price and the amount due under the decree or certificate together with the costs incurred in bringing the tenure or holding to sale and any rent which may have become payable to the decree-holder between the date of the institution of the suit and the date of the confirmation of the sale.

(2) In any proceeding pending on the date of the commencement of the Bengal Tenancy (Amendment) Act, 1940, in execution of a decree or certificate to which the provisions of sub-section (1) apply, if there has been attached any immoveable property of the judgment-debtor other than the entire tenure or holding to which the decree or certificate relates, and if the property so attached has not been sold, the Court or certificate-officer as the case may be shall, on the application of the judgment-debtor, direct that, on payment by the judgment-debtor of the costs of the attachment, the property so attached shall be released."

The rest of the section is not material.

The first question for consideration is whether section 168-A of the Bengal Tenancy Act is covered by Entry No. 21 or No. 21 read with Entry No. 2 of List II. That List covers matters on which the Provincial Legislature has exclusive powers to make laws. It was contended on behalf of the appellant that under Regulation VIII of 1819, the landlord had a right to recover the amount due as a personal debt. Under that Regulation, power is given to the landlord to get the tenure sold only for the rent of the previous year without filing a suit for the purpose. Section 17 of that Regulation provides for the disposal of the proceeds of any sale made under the Rules of that Regulation. A certain percentage from the net sale proceeds had first to be deducted on account of the Provincial Government. The zamindar was next to be paid the rent of the preceding year with interest and charges incurred in bringing the taluq to sale. Then follows a proviso which runs as follows:

"Provided, however, that no former balances beyond those of the current year (or of that immediately expired, if the sale be at the commencement of the following year) shall be included in the demand to be thus satisfied. Such antecedent balances, if the zamindar shall have omitted to avail himself of the process within his reach for having them satisfied at the time, will have become in fact mere personal debts of the individual taluqdar and must be recovered in the same way as other debts by a regular suit in the Court."

It was further provided that the balance should be sent to the treasury of the Collector to meet the other claims pending against the taluqdar. Relying on the words of the proviso, it was argued on behalf of the appellant that the decree passed for arrears of rent in the present case was not a decree for rent but for a money claim. It was, therefore, contended that it was not passed under the Bengal Tenancy Act.

In our opinion, the first contention that the Provincial Legislature had no power to enact section 168-A is unsound. The words of Entry No. 21 clearly cover legislation in respect of rights in or over land and include the relation of landlord and tenant and the collection of rents. The meaning of section 168-A is very clear. It appears to have been enacted to prevent a landlord from depriving a tenant of his other moveable or immoveable property to satisfy the claim for rent of the property let to the tenant. Sub-clause (1) (*a*) therefore directs that a decree for arrears of rent which has the effect of a rent decree or a money decree shall not be executed by the attachment and sale of any moveable or immoveable property other than the entire tenure or holding to which the decree relates. Sub-clause (1) (*b*) recognises that there may be a deficit and the decree may not be fully satisfied by the sale proceeds. It, therefore, provides that the purchaser shall make good that deficit. Sub-section (2) (which, in fact, applies to the present case) expressly directs that in any proceeding pending on the date of the commencement of the Amending Act, in execution of a decree to which sub-section (1) applied, if any immoveable property was attached the same should be released on the

application of the judgment-debtor on his paying the costs of the attachment. It is, therefore, clearly a piece of legislation in respect of the right of landlord and tenant with regard to rent which had accrued due in respect of the property let to the tenant. In our opinion, therefore, the words of Entry No. 21 clearly cover this section.

If it were argued that this is a procedural section in respect of attachment of property and therefore is not covered by Entry No. 21 in List II, Entry No. 2 is relevant. It provides for legislation in respect of the jurisdiction and powers of all Courts (except the Federal Court) with respect to any of the matters in List II. The collection of rents is covered by Entry No. 21. The jurisdiction and powers of the Courts in respect of the Collection of rents is therefore covered by Entry No. 2 in the List. Section 168-A of the Bengal Tenancy Act clearly deals with the powers and jurisdiction of the Court to get money paid to a decree-holder in respect of his decree for arrears of rents of agricultural lands. We, therefore, agree with the learned Judges of the High Court at Calcutta that section 168-A is covered by Entries Nos. 21 and 2 of List II of Schedule VII of the Constitution Act.

The next contention that the impugned section is in conflict with Entry No. 4 of List III of the same Schedule has also no substance. The contention was that under section 51 of the Civil Procedure Code a decree-holder had the right to have his decree executed as provided therein. Section 168-A, it was argued, was in conflict with section 51 of the Civil Procedure Code and therefore the Provincial Legislature had no right to enact the same, as section 51 of the Civil Procedure Code was already on the Statute Book when section 168-A of the Bengal Tenancy Act was enacted. The answer to this is found in section 143 (2) of the Bengal Tenancy Act. That section runs as follows :

" 143. (1) The High Court may from time to time, with the approval of the Provincial Government, make rules consistent with this Act, declaring that any portions of the Code of Civil Procedure shall not apply to suits between landlord and tenant as such, or to any specified classes of such suits, or shall apply to them subject to modifications specified in the rules.

(2) Subject to any rules so made and subject also to the other provisions of this Act, the Code of Civil Procedure, 1908, shall apply to all such suits."

Sub-section (2) expressly makes the application of the Civil Procedure Code subject to the other provisions of the Bengal Tenancy Act. If the Provincial Legislature had power to enact section 168-A under Entries Nos. 21 and 2 of List II, it is a valid piece of legislation and will form part of the Bengal Tenancy Act. That being so, the Civil Procedure Code can apply only subject to the provisions of the Bengal Tenancy Act and that would include section 168-A. It may also be noted that the Civil Procedure Code is made applicable to decrees passed under the Bengal Tenancy Act only because of section 143 of that Act. If the same Act (which makes provision for its application) at another place provides that it shall not apply to a certain extent, it cannot be successfully contended that the last provision is in conflict with Entry No. 4 of List III of Schedule VII of the Constitution Act and is therefore *ultra vires*. In our opinion, therefore, this contention must fail.

The last contention was that this decree is outside the Bengal Tenancy Act and therefore section 168-A of the Act cannot apply to it at all. It is necessary to look at the record to ascertain if this decree was passed under the Bengal Tenancy Act. It is admittedly a claim in respect of arrears of rent of land given on *patni* tenure. It is registered as Rent Suit No. 2 of 1937 between landlord and tenant for the recovery of rent as contemplated by section 146 of the Act. The suit is for rent of three and a half years only. That can be done under Schedule III, article 2 (*b*) of the Bengal Tenancy Act. If this was a money claim, apart from the Bengal Tenancy Act, the landlord could have filed a suit to recover arrears of six years' rent on the registered lease. That has not been done. Apart from the contention urged by Counsel before us, it does not appear to have been raised in the lower Courts and the record does not show any reason why we should accept this contention. Apart from that, the wording of section 168-A covers the case. It is made applicable when the decree is for arrears of rent, whether having the effect of a rent

decree or money decree. The opening words of the section further show that effect must be given to the section notwithstanding anything contained elsewhere in the Bengal Tenancy Act, or in any other law, or in any contract. If the Legislature has power to pass the Act, none of these phrases oversteps the legislative limits of the Provincial Legislature. Therefore, the section would be applicable even though the decree may not be considered as passed under the Bengal Tenancy Act. We do not think that the contention of the appellant that the decree in the present case is not a decree for rent has any substance. Moreover, under section 168-A if a decree for arrears of rent is passed, whether it has the effect of a rent decree or a money decree, the consequences mentioned in the section have to follow. The appellant, therefore, is in no better position in either case. In our opinion, the proviso to section 17 of Regulation VIII of 1819 does not make the arrears of rent a money claim. The proviso only states that the balance of the sale proceeds shall not be utilised in paying the arrears of rent, but those arrears must be recovered by the landlord as personal debts by an ordinary civil suit. The procedure to cause the property let to the tenant to be sold for the immediately preceding year's rent only, is a special procedure provided by Regulation VIII of 1819 and a landlord can take advantage of it without going to a Court at all.

It was strenuously urged on behalf of the appellant that no provision of the Bengal Tenancy Act can apply after the relation of landlord and tenant had ceased to exist. It was pointed out that before the present suit was filed, the land was sold under Regulation VIII of 1819. Therefore, no relationship of landlord and tenant existed between the parties when the present suit to recover arrears of rent was filed. In support of this contention, Counsel relied on *Arthur Henry Forbes* v. *Bahadur Singh and others*[1]. In that case, the Judicial Committee of the Privy Council had occasion to consider section 65 of the Bengal Tenancy Act which is in the following terms :

> "Where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy-raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon."

The Board held that the right of sale and the charge given by the section existed only in favour of a person who occupied the position of a landlord and so long as the relationship of landlord and tenant continued. In our opinion, that case does not help the appellant. The decision was on the construction of section 65 of the Bengal Tenancy Act. The words used in the section are clearly applicable only when the relationship of landlord and tenant existed on the date of the suit. There can arise no occasion for an ejectment, or a claim to a first charge on a property liable to be sold in execution of a decree for the rent, unless on the date of the suit the parties were a landlord and tenant. In the course of that judgment, certain observations showing that the Bengal Tenancy Act would operate or would govern the rights of the parties when they were landlord and tenant, are found, but those observations, as has been repeatedly pointed out, must be read along with the facts of the case. A careful reading of the judgment shows that the Judicial Committee of the Privy Council were dealing only with the effect and interpretation of section 65. We do not think that that case supports the wide proposition urged on behalf of the appellant.

The result is that the appeals fail and are dismissed with costs.

G.R./V.S. *Appeals dismissed.*

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1. (1914) L.R. 41 I.A. 91 : 27 M.L.J. 4 : I.L.R. 41 Cal. 926 (P.C.).

[FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Fort William in Bengal).

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR MUHAMMAD ZAFRULLA KHAN AND H. J. KANIA, JJ.

Sripati Lal Khan and others .. *Appellants**

v.

Pasupati Modak .. *Respondent.*

Intervener : The Advocate-General of Bengal.

Bengal Tenancy Act (VIII of 1885, as amended in 1940), section 26-G and Government of India Act (1935), Schedule VII, List II, Entry No. 21—Provincial legislation affecting rights of parties under an anomalous mortgage—Validity—Scope of Entry No. 21 of List II—Transfer of interest in agricultural land also, if covered by.

On a contention that section 26-G of the Bengal Tenancy Act as amended in 1940 was *ultra vires* the Provincial Legislature in so far as it affected the rights of parties under an anomalous mortgage,

Held, the creation of an usufructuary mortgage and the rights of the parties thereunder are clearly covered by the words of Entry No. 21 of List II of Schedule VII of the Constitution Act. In the same way, the rights of the landlord and tenant under an anomalous mortgage in respect of agricultural lands are equally capable of being defined and, if so, altered by a Provincial Legislature. Therefore, when a Provincial Legislature passes an Act providing that a mortgagee, who is in possession for 15 years and more, shall be considered and treated as if the mortgage debt and interest were paid off, it does not go beyond the legislative powers of the Province. The same provision can be made in respect of an usufructuary mortgage or other mortgage. The impugned legislation, is thus clearly within the terms of Entry No. 21 of List II.

The contention that the amendment of section 26-G in 1940, is in conflict with the Transfer of Property Act, because a mortgage is created under that Act cannot be accepted for the reason that the Entry No. 21 of List II which covers the transfer of agricultural land, will cover the transfer of an interest in such land also.

Samarendra Nath Mukherjee, Advocate, Federal Court (*Purushottam Chatterjee*, Advocate, Calcutta High Court, with him) instructed by *Ranjit Singh Narula* Agent, for Appellants.

Rama Prosad Mukherjee, Senior Advocate, Federal Court (*Nirmal Kumar Sen*, Advocate, Federal Court, with him) instructed by *P. K. Bose*, Agent, for the Intervener.

[RESPONDENT HAS NOT ENTERED APPEARANCE].

The Judgment of the Court was delivered by

KANIA, J.—This is an appeal from the judgment of a Division Bench of the Calcutta High Court and raises the question of the validity of section 26-G of the Bengal Tenancy Act, as amended by the Bengal Tenancy Act of 1940.

The material facts are these. On the 12th February, 1927, the father of the respondent mortgaged the disputed properties in favour of the father of the appellants. It was contended to be an anomalous mortgage. The lands were agricultural lands and it is common ground that the Bengal Tenancy Act applied to the transaction between the parties. The material portions of section 26-G (before its amendment) ran as follows :

"(1a) Notwithstanding anything contained in this Act or in any other law or in any contract, every usufructuary mortgage subsisting in or after the first date of August 1937, which was so entered into before the commencement of the Bengal Tenancy (Amendment) Act, 1928, shall be deemed to have taken effect as a complete usufructuary mortgage for a period mentioned in the instrument or for 15 years whichever is less."

"(5) Notwithstanding anything contained in this Act or in any other law or in any contract, the consideration (with all interest thereon) for a complete usufructuary mortgage or for another form of usufructuary mortgage deemed under sub-section (1a) to have taken effect as a complete usufructuary mortgage, entered into by an occupancy-raiyat in respect of his holding or a portion or share thereof, shall be deemed to have been extinguished on the expiry of the period (a) mentioned in the instrument of the mortgage, or (b) of fifteen years, whichever is less, from the date of the registration of the instrument, or where there is no registered instrument, from the date of the mortgagee's entry into possession, and the mortgagor shall thereupon become entitled to possession of the mort-

* Civil Appeal No. 9 of 1945. 4th January, 1947.

gaged holding, and he may, if he is not forthwith given possession, apply to the Court or to a Revenue Officer to be restored thereto."

A complete usufructuary mortgage is defined in section 3 (3) as follows :

" 'Complete usufructuary mortgage' means a transfer by a tenant of the right of possession in any land for the purpose of securing the payment of money or the return of grain advanced or to be advanced by way of loan upon the condition that the loan, with all interest thereon, shall be deemed to be extinguished by the profits arising from the land during the period of the mortgage."

By the Bengal Tenancy (Amendment) Act of 1940, for sub-section (1*a*), the following sub-section was substituted :

" (1*a*) Notwithstanding anything contained in this Act or in any other law for the time being in force or in any contract, every mortgage (including a mortgage by conditional sale) entered into by an occupancy-raiyat in respect of his holding or of a portion or share thereof in which possession of land is delivered to the mortgagee—

(*a*) which was so entered into before the commencement of the Bengal Tenancy (Amendment) Act, 1928, and was subsisting on or after the first day of August, 1937, or

(*b*) which, being other than a usufructuary mortgage having under sub-section (1) no force or effect, was so entered into after the commencement of the Bengal Tenancy (Amendment) Act, 1928, and before the commencement of the Bengal Tenancy (Amendment) Act, 1940, and was subsisting on or after the commencement of the Bengal Tenancy (Amendment) Act, 1940, shall be deemed to have taken effect as a complete usufructuary mortgage for the period mentioned in the instrument or for fifteen years, whichever is less."

In the case before us, after the amendment was made in April 1940, the respondent applied to the Debt Settlement Board for settlement of his debts. While the matter was pending before the Board, on the 28th March, 1942, the respondent filed an application under the amended section 26-G for restoration of the mortgaged premises to him. That application was opposed by the appellant on the ground that money was due to him and the debt cannot be extinguished. It was contended that section 26-G, in so far as it affected the rights of the parties under an anomalous mortgage, was *ultra vires* the Provincial Legislature. The appellant failed in the two lower Courts. The High Court, however, granted a certificate under section 205 of the Government of India Act, 1935, and the appellant has therefore come in appeal before us.

On his behalf it was contended that the Provincial Legislature had no power to extinguish the debt and while the debt remained unpaid, he could not be ordered to hand over possession of the mortgaged premises. In our opinion, the wording of Entry No. 21 of List II of Schedule VII of the Constitution Act affords a complete answer to the appellant's contention. Entry No. 21 runs as follows :

" Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents, transfer, alienation and devolution of agricultural land, land improvement and agricultural loans ; colonization ; Court of Wards ; encumbered and attached estates ; treasure trove."

The creation of an usufructuary mortgage and the rights of the parties thereunder are clearly covered by the words of that Entry. In the same way, the rights of a landlord and tenant under an anomalous mortgage in respect of agricultural lands are equally capable of being defined and, if so, altered by a Provincial Legislature. Therefore when a Provincial Legislature passes an Act providing that a mortgagee, who is in possession for 15 years and more, shall be considered and treated as if the mortgage debt and interest were paid off, it does not go beyond the legislative powers of the Province. The same provision can be made in respect of an usufructuary mortgage or other mortgage. The amendment, in our opinion, is thus clearly within the terms of Entry No. 21 of List II. We are not concerned in the present case with the question of extinguishment of the debt. That question is still pending before the Debt Settlement Board. We are concerned only with the order made by the lower Courts to deliver over possession of the lands to the mortgagor. It was contended that this amendment is in conflict with the Transfer of Property Act, because a mortgage is created under the Transfer of Property Act. In our opinion, this argument cannot be accepted, because Entry No. 21 of List II covers the transfer of agricultural land. That will cover the transfer of an interest in such land also.

The result is that the appeal fails and is dismissed with costs.

G.R./V.S. — *Appeal dismissed*

[FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Lahore.)

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR MUHAMMED ZAFRULLA KHAN AND H. J. KANIA, JJ.

The Punjab Flour and General Mills Co., Ltd., Lahore .. *Appellant**

v.

The Chief Officer, Corporation of the City of Lahore and the Province of the Punjab .. *Respondents.*

Government of India Act (1935), *Schedule VII, List I, Entry No.* 58 *and List II, Entry No.* 49—*Taxation by local authority—Nature of—Determining factors—Distinction between terminal taxes under Entry No.* 58 *of List I and cesses on entry of goods into a local area under Entry No.* 49 *of List II—Local taxation under Entry No.* 49 *of List II, if can extend to rail-borne goods—Nature of tax, if affected by the presence or absence of a provision for refunds.*

In deciding the question as to the competency of a provincial or local authority to impose a particular tax, no conclusion can possibly be based on the forms of taxes or nomenclature applied to the taxes imposed prior to April, 1937. The Constitution Act made a great alteration in the powers of Provinces and local authorities to impose local taxation and as such the enquiry must be limited to the particular taxes imposed to ascertain whether or not they did or did not come within the powers of the Province or local authority as conferred by the Constitution Act. Further, the examination must be directed to ascertain the real nature and incidence of these taxes in fact and for this no great help can be obtained from the use of names employed or definitions applied by the local authority to such taxes.

There is a definite distinction between the type of taxes referred to as terminal taxes in Entry No. 58 of List I of the Seventh Schedule and the type of taxes referred to as cesses on the entry of goods into a local area in Entry No. 49 of List II. The former taxes must be (*a*) terminal, (*b*) confined to goods and passengers carried by railway or air. They must be chargeable at a railway or air terminus and must be referable to services (whether of carriage or otherwise) rendered or to be rendered by some rail or air transport organisation. The essential features of the cesses referred to in Entry No. 49 of List II are on the other hand simply (*a*) the entry of goods into a definite local area and (*b*) the requirement that the goods should enter for the purpose of consumption, use or sale therein. The wording of Entry No. 20 of List I and Entry No. 18 of List II do not justify a deduction that all taxation on rail and air-borne goods must be imposed, if at all, under the powers conferred by Entry No. 58 of List I and that powers of taxation conferred by Entry No. 49 of List II must be confined to goods that enter by road or internal waterway only. That would impose a limitation on local taxation under Entry No. 49 of List II, which would often work most inequitably in practice between those importing goods by road or waterway and those who could import by rail or air. There is no such limitation to be implied in Entry No. 49 of List II in regard to the manner in which the goods may be transported into a local area. It follows that so far as rail-borne goods are concerned, the same goods may well be subjected to local taxation under Entry No. 49 of List II. The grounds of taxation under the two Entries are radically different and it cannot be said that taxation under the one Entry limits or interferes in any way with taxation under the other.

It cannot be said that if cesses are imposed in pursuance of the powers conferred by Entry No. 49 in List II, provision should be made for refunds. Whether or not there should be any refunds in respect of such cesses is a matter open for determination by the provincial or local taxing authority, and the existence or non-existence of a provision or a system of refunds cannot affect the tax being or not being a cess within Entry No. 49.

On the question as to the legality of the tax imposed by the Lahore Municipality on a company owning mills and carrying on the business of milling wheat in respect of wheat which it imported by rail to its mills within the local area,

Held, that the disputed impositions were not terminal taxes within Entry No. 58 of List I but were cesses on the entry of goods into a local area within Entry No. 49 of List II and were therefore properly imposed by the Lahore Municipality. The conversion of the wheat by grinding into flour products involved an user by the company of the wheat.

S. Raghbir Singh, Senior Advocate, Federal Court (*M. K. Madan*, Advocate, Federal Court, with him) instructed by *S. Ranjit Singh Narula*, Agent, for Appellant.

M. C. Sitalvad, Senior Advocate, Federal Court (*Kali Sharan Pandit* and *G. N. Joshi*, Advocates, Federal Court, with him) instructed by *Tarachand Brijmohanlal*, Agent, for Respondent No. 1.

Basant Krishna Khanna, Advocate-General, Punjab (*Vir Sen Sawhney*, Advocate, Federal Court, with him) instructed by *Tarachand Brijmohanlal*, Agent, for Respondent No. 2.

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*Civil Appeal No. 10 of 1945. 4th January, 1947.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant in this case is the Punjab Flour and General Mills Company. That Company has large mills at Shahdara, Lahore, where before the recent war, it carried on the business (*inter alia*) of milling wheat which it imported by rail to its mills. The wagons containing the wheat were drawn by engines to a point known as "the point of intersection" immediately outside the premises of the appellant. There delivery of the wheat was taken by the appellant. From the point of intersection the wagons were hand hauled into a private siding on the premises of the appellant and there unloaded. In the mills of the appellant the wheat was, by grinding, converted into flour and other consumable products, and the bulk of the wheat was in due course in such converted form again re-exported by rail from the mills. Contracts for sale of flour and other products re-exported by rail were effected through a selling agent, in Lahore, or, if effected by agents elsewhere, were confirmed by the appellant at the mills. Prior to 1938, the mills of the appellant were not within the municipal limits of Lahore, but in that year the municipal limits were extended to include Shahdara and the appellant's mills.

The first respondent is the Chief Officer of the Corporation of the City of Lahore. The Corporation was constituted by the City of Lahore Corporation Act 1941, and the Chief Officer was appointed under the provisions of that Act. That Act came into force on the 1st July, 1942. The predecessors of the Corporation and its Chief Officer were the Lahore Municipality and later an Administrator, constituted under the provisions of and exercising the powers conferred by the Punjab Municipal Act, 1911, as amended from time to time.

By Notification No. 33833 in the Punjab Government Gazette of 19th November, 1926, the Municipality of Lahore duly gave notice of the imposition, under its then existing powers of local taxation, of a tax called a Terminal Tax calculated on the gross weight of consignments or per tail as the case might be, at the rates and on the articles specified in the schedule, imported into the Municipality by rail or by road. In the taxable articles in the schedule was included grain. By a Notification No. 1380 of 28th April, 1938, the Administrator of the Municipality duly gave notice of the imposition with effect from 1st August, 1938, of a tax in supersession of the tax, the imposition of which was notified in the above-mentioned Notification of November, 1926. The new tax was called "Octroi (without refunds)" and was to be calculated on the gross weight of consignments and on animals per tail at the rates and on the articles specified in the schedule, imported into the limits of the Municipality. Again in the schedule was included grain. In its turn the tax referred to in Notification No. 1380 of 28th April, 1938, was superseded by a tax the imposition of which was notified by Notification No. 422-C of the 6th February, 1940, to take effect from 11th May, 1940. This tax was also called "Octroi (without refunds)" and was to be charged on consignments, including grain, imported into the limits of the Municipality.

Consequent upon the inclusion in 1938 of the appellant's mills within the municipal boundaries and the imposition of the tax called "Octroi (without refunds)" notified by the Notification of April, 1938, above referred to, claims were made by the Administrator for the payment of the said Octroi (without refunds) by the appellant in respect of all wheat, including wheat carried by rail, imported by the appellant to its said mills at Shahdara. It was claimed by the appellant that the tax the imposition of which was notified by the Notification of April, 1938 and the tax which superseded it and the imposition of which was notified by the Notification of February 1940 were, whatever they might be called, terminal taxes on goods carried by railway and as such were not imposable, after the coming into force of the Government of India Act, 1935, by any Province or local authority by reason of Entry No. 58 in List I of the Seventh Schedule to the said Act. On behalf of the Municipality it was argued that the taxes in question were clearly within the provisions of Entry No. 49 of List II in the said Seventh Schedule and as such were taxes which the Municipality could with the previous sanction of the Provincial Government

impose under the provisions of section 61 (2) of the Punjab Municipal Act, 1911, as modified by the Government of India (Adaptation of Indian Laws) Order, 1937.

Section 61 of the Punjab Municipal Act, 1911, gives powers by sub-section (1) to a Municipal Committee to impose certain specified taxes subject to certain limitations and then authorises such further taxes as come within sub-section (2) which as modified as aforesaid, runs as follows :

"Save as provided in the foregoing clause, with the previous sanction of the Provincial Government any other tax which the Provincial Legislature has power to impose in the Province under the Government of India Act, 1935."

Entry No. 58 in List I of the Seventh Schedule to the Government of India Act, 1935, is as follows :

"Terminal taxes on goods or passengers carried by railway or air; taxes on railway fares and freights."

Entry No. 49 in List II in the said Schedule is as follows :

"Cesses on the entry of goods into a local area for consumption, use or sale therein."

As there was no regular municipal barrier at "the point of intersection" to collect the octroi taxes, the Administrator eventually authorised somewhat violent means to bring the dispute to a head, namely, an attempt to seize by a raiding party stocks of wheat and wheat products from the appellant's mills. This raid took place in January, 1941, and resulted in the commencement by the appellant of this suit against the Administrator on the 3rd February, 1941. After the coming into operation of the City of Lahore Corporation Act, 1941, the present first respondent was substituted for the Administrator. Eventually on the 11th June, 1945, a Divisional Bench of the High Court at Lahore (Sir Trevor Harries, C.J. and Abdul Rahman, J.) dismissed the appellant's action but granted a certificate under section 205 of the Government of India Act, 1935, whereupon the appellant brought this appeal to this Court.

The main point to be decided is whether or not the particular taxes in this case called "Octroi (without refunds)" the impositions of which were notified by the above-mentioned Notifications of April, 1938 and February, 1940, were "cesses on the entry of goods into a local area for consumption, use or sale therein" [Entry No. 49 of List II] or whether, as claimed by the appellant, they really amounted to "Terminal taxes on goods carried by railway" [Entry No. 58 of List I]. A subsidiary point has also to be decided, namely, whether, even if these taxes are held to be "cesses on the entry of goods into a local area," the appellant's wheat in fact entered the area for consumption, use, or sale therein.

On the main point, the appellant's counsel stressed that the original tax which was imposed in 1926 was imposed as a Terminal Tax, and was chargeable on grain imported by rail, and that therefore the taxes of 1938 and 1940, if chargeable on grain imported by rail, were only a continuation of the old tax under a new name and were really terminal taxes, and that after the coming into operation of the Government of India Act, 1935, the provincial or local authority could not impose such terminal taxes. In our judgment no conclusions can possibly be based on the forms of taxes or the nomenclature applied to the taxes imposed prior to 1st April, 1937. The Government of India Act made a great alteration in the powers of Provinces and local authorities to impose local taxation, and our enquiry must be limited to an examination of the taxes imposed in 1938 and 1940 to ascertain whether or not the taxes claimed on the grain imported by the appellant did or did not come within the powers of the Province and the municipality as conferred by the Government of India Act, 1935. Further our examination must be directed to ascertain the real nature and incidence of these taxes in fact and for this purpose no great help can be obtained from the use of the names employed or definitions applied by the Municipality to these taxes. So far however as such points can help us, it is to be noted in favour of the Corporation's claim that from 1938 onwards the description Terminal Tax was in fact not used in regard to the

taxes in dispute in this action and that in an extensive revision in 1938, following the coming into effect of the Government of India Act, 1935, of the Lahore Municipal Account Code, [a body of rules dealing (*inter alia*) with many details of local taxes] a definition of "octroi" was inserted in section I of Chapter V, the Chapter headed "Octroi" defining "octroi" in terms adapted directly from those used in Entry No. 49 in List II of the Seventh Schedule to the Act as meaning "a cess on the entry into a Municipality of goods for consumption, use or sale therein." But of course, if, in fact the taxes on examination are really, having regard to their nature and incidence, not cesses on the entry of goods into the Lahore Municipality at all but terminal taxes on the carriage of goods by rail, the names and definitions given and applied by the Municipality to the taxes could not bring them within the taxing powers conferred on Provinces by the Government of India Act, 1935.

There appears to us a definite distinction between the type of taxes referred to as terminal taxes in Entry No. 58 of List I of the Seventh Schedule and the type of taxes referred to as cesses on the entry of goods into a local area in Entry No. 49 of List II. The former taxes must be (*a*) terminal, (*b*) confined to goods and passengers carried by railway or air. They must be chargeable at a rail or air terminus and be referable to services (whether of carriage or otherwise) rendered or to be rendered by some rail or air transport organisation. The essential features of the cesses referred to in Entry No. 49 of List II are on the other hand simply (*a*) the entry of goods into a definite local area and (*b*) the requirement that the goods should enter for the purpose of consumption, use or sale therein. It is to be noted that there is no limitation on the manner by which the goods to be subjected to such cesses may enter. There is no ground for suggesting that the entry of goods by rail or air is any less contemplated than entry by waterway or road. It was argued by the appellant's counsel that because by Entry No. 20 of List I Federal railways and the regulation of railways and so forth is included in the Central Government Legislative List and by List II the Provincial Government is mainly given the powers of legislation over roads and internal waterways and transport thereon [Entry No. 18], it should therefore be deduced that all taxation on rail and air-borne goods must be imposed, if at all, under the powers conferred by Entry No. 58 of List I and that powers of taxation conferred by Entry No. 49 of List II must be confined to goods that enter by road or internal waterway only. We cannot accept this argument. It is not in our judgment justified by the wording of the various entries in the two Lists and would impose a limitation on local taxation under Entry No. 49, List II, which would often work most inequitably in practice between those importing goods by road or waterway and those who could import by rail or air. In our judgment there is no limitation to be implied in Entry No. 49, List II, in regard to the manner in which goods may be transported into a local area. It follows that so far as rail-borne goods are concerned, the same goods may well be subjected to taxation under Entry No. 58 of List I as well as to local taxation under Entry No. 49 of List II. The grounds of taxation under the two Entries are, as indicated above, radically different, and there is no case for suggesting that taxation under the one entry limits or interferes in any way with taxation under the other.

It now remains to determine, having decided that taxation of rail-borne goods may be authorised by Entry No. 49 of List II, whether in this case the disputed taxes were cesses on the entry of goods into Lahore Municipal limits. In both the Notifications of 1938 and 1940 the tax is notified as imposed on consignments of goods and animals "imported into the limits of the Municipality as notified from time to time in the Punjab Government Gazette," with provisions exempting certain articles. On the face of the Notification the tax is leviable solely in respect of the importation. There is no reference to method of transport or carriage. There is also no express reference on the face of the Notification to the limitation imposed by Entry No. 49 itself, namely, that the taxation must be limited to goods entering for consumption, use or sale in the area. That limitation appears to have been expressly brought into effect by the insertion of the definition of octroi in the amendments of 1938 to the Municipal Account Code referred to earlier.

But the absence in the Notifications themselves or elsewhere of any express reference to the limitation would not make the taxes cease to be taxes on the entry of goods into an area if that were the basis of imposition and claim. In the Notification there is no sort of suggestion that the taxes are terminal taxes. It was argued that as the taxes were expressly imposed "without refunds," that indicated that they were really terminal taxes and in this connection we were referred to the judgment of Becket, J., in an unreported case in the High Court at Lahore of *Dwarka Das* v. *The Administrator, City of Lahore Corporation*[1]. We were wholly unable to appreciate either the reasoning or conclusions of the learned Judge. We can see no cause whatsoever for holding that if cesses are imposed in pursuance of the powers conferred by Entry No. 49 in List II, any provision need be made for refunds. Whether or not there should be any refunds in respect of such cesses appears to us to be a matter open for determination by provincial or local taxing authority, and the existence or non-existence of a provision or system of refunds cannot affect the tax being or not being a cess within Entry No. 49.

In our judgment the impositions disputed in this case are not terminal taxes within Entry No. 58 of List I but are cesses on the entry of goods into a local area within Entry No. 49 of List II and were, therefore, properly imposed by the Lahore Municipality in 1938 and 1940 even on rail-borne goods entering the municipal area and were payable by the appellant Company provided that the wheat, the taxes on which are disputed, in fact entered the municipal area for consumption, use or sale therein.

On this last point, it should be stated that the appellant never disputed paying the taxes in question on such flour or other products of the wheat as were in fact consumed by or delivered to persons inside the Municipal limits. The dispute was confined to the claims for taxes on wheat which was imported by rail by the appellant to its mills for grinding into flour or other products, such or a similar amount or flour or other products being then re-exported by rail to places outside the Municipal limits to purchasers or agents for sale. In some cases the flour or other products of the wheat were used to fulfil contracts for sale of flour and such other products entered into before the wheat arrived at the mills. Sometimes the flour and other products were used to fulfil contracts entered into whilst the wheat was at the mill. In other cases the flour and other products were re-exported to be sold by agents outside the Municipal limits. In all cases the wheat was converted by grinding into flour and other products and it was the flour and other products that were re-exported. The learned Judges of the High Court were agreed that the conversion of the wheat by grinding into flour or other products involved an user by the appellant of the wheat. We agree. We do not think it is possible for the appellant to deny that it used the wheat in its mills to convert it into the flour and other products, in which it did business. It also seems clear that in many cases contracts for sale were entered into or confirmed within the Municipal limits in respect of the wheat products. In our judgment all the wheat imported by the appellant by rail, the taxes on which are in dispute in this case, entered the Municipal limits of Lahore for consumption, use or sale therein. The claim for the disputed taxes was well founded and this appeal is therefore dismissed with costs.

Having regard to our conclusion it is unnecessary to consider whether the Octroi taxes in question are continuing taxes within the meaning of section 143 (2) of the Constitution Act.

G.R./V.S. *Appeal dismissed.*

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1. Regular Second Appeal No. 430 of 1940.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR AND MR. JUSTICE SHAHABUDDIN.

Krishnan Chettiar .. *Appellant**

v.

Minor Lakshmanan Chettiar, by mother and guardian, Meenakshi Achi and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 2—Execution petition to realise balance of decree deb allotted in partition by father to son—Plea of satisfaction by payment to father—Alleged payment found against—Memorandum of full satisfaction filed by the father, if a bar to execution—Locus standi *of father to file it.*

Under a registered deed of partition dated 28th December, 1944, the balance due under a decree obtained by the father was allotted to his son. When the son filed on 27th March, 1945, an Execution Petition to realise the balance due under the decree the judgment-debtor pleaded satisfaction of the decree by payment to the father on 28th June, 1944 and it was supported by the father filing a memorandum of full satisfaction on 7th August, 1945. But it was found by the Court that no money was really paid by the judgment-debtor to the father. On a question whether nevertheless the Court had no jurisdiction to execute the decree in the face of the decree-holder's memorandum of full satisfaction of the decree,

Held, that as the decree had been found to be really not satisfied by payment and the original decree-holder, the father, ceased to have any interest in it after the date of the partition when that interest passed to his son, the father had thereafter no *locus standi* to file any memorandum of full satisfaction of the decree and it could not help the judgment-debtor to object to the execution of the decree.

Kadir Meera Saheb Taraganar v. *Pir Mahomed Taraganar*, (1933) 64 M.L.J. 732, distinguished.

Appeal against the order of the Court of the Subordinate Judge, Sivaganga, dated 24th August, 1945, in E.P. No. 43 of 1945, in O.S. No. 6 of 1941.

S. V. Subramanyam for Appellant.

A. Sundaram Aiyar for Respondents.

The Judgment of the Court was delivered by

Rajamannar, J.—The second respondent obtained a decree in O.S. No. 6 of 1941 on the file of the Court of the Subordinate Judge, Sivaganga, against the appellant and his father on 23rd July, 1941. Some time subsequent to the decree the appellant's father died. In August, 1941, there was an agreement between the decree-holder and the appellant that the decree debt might be discharged in two instalments. On 12th June, 1942, the first instalment was paid but the second instalment was not paid on the due date. On 24th August, 1943, a sum of Rs. 600 was paid.

On 27th March, 1945, the minor son of the second respondent (who is the first respondent before us) filed E.P. No. 43 of 1945 for realising the balance due under the decree. He based his claim on a registered deed of partition dated 28th December, 1944, entered into between his father, the second respondent, and himself, represented by his next friend, under which the decree debt in question was allotted to him. The appellant objected to the execution on the ground that he had paid the balance due under the decree on 28th June, 1944, to the second respondent and that the second respondent passed him a receipt Ex. D-2 in full satisfaction of the decree debt. The second respondent himself followed by filing a memorandum of full satisfaction of the decree on 7th August, 1945.

The learned Subordinate Judge found that no money was really paid on 28th June, 1944, as alleged by the original decree-holder and that Ex. D-2 was brought into existence to defraud the petitioner. He therefore allowed the execution to proceed. The judgment-debtor appeals.

The learned advocate for the appellant attempted to challenge the findings of fact that Ex. D-2 was ante-dated and that no money was really paid but we are convinced that the conclusion arrived at by the learned Subordinate Judge was the only conclusion in the circumstances.

*A.A.O. No. 693 of 1945. 3rd December, 1946.

The next contention of the appellant was that even if no money had been paid and the decree had not really been satisfied, nevertheless as the decree-holder filed the memorandum of full satisfaction the Court had no jurisdiction to proceed with execution. He relied on a decision of Walsh, J., in *Kadir Meera Saheb Taraganar* v. *Pir Mohamed Taraganar*[1], but the facts in that case differ from the facts in the present case. In that case, after the decree-holder had put in an application stating that the decree amount had been paid in full and that satisfaction might be entered, an agent of his purporting to act under a Power of attorney in his favour assigned the decree to a third party who sought to be brought on record as the assignee decree-holder and to be permitted to execute the decree. The learned Judge held that if the decree-holder had intimated to the Court that the decree had been satisfied it was not open to the Court to go into the question whether the report of satisfaction was intended to defraud or defeat the rights of some third party who was not before the Court. In the present case the first respondent, that is, the minor son obtained the right to the decree on 28th December, 1944. If the decree had been really satisfied before that date then certainly nothing passed to the first respondent under the partition deed but if as has been found in this case the decree had not really been satisfied by payment on 28th December, 1944, the original decree-holder ceased to have any interest in the decree which interest passed to the minor, the first respondent. It is clear that any memorandum of full satisfaction filed on a date subsequent to the filing of E.P. No. 43 of 1945 would not avail the appellant. The second respondent had no *locus standi* to file the memorandum of full satisfaction on 6th August, 1945. The learned Subordinate Judge was right in allowing the execution. The appeal is dismissed with costs of the first respondent.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL.

Uppalapati Venkataratnam .. *Petitioner**

v.

Uppalapati Apparao .. *Respondent.*

Civil Procedure Code (V of 1908), Order 17, rules 2 and 3—Scope and applicability—Plaintiff absent on the date of the trial and her counsel reporting "no instructions"—Defendant admitting part of claim—Decree for that part and dismissal of rest of claim on merits after hearing defendant's counsel—Remedy of plaintiff—Application under rule 9 of Order 9—Maintainability.

The plaintiff in a suit asked for arrears of maintenance and for an enhancement of the previous rate which had been fixed by a registered agreement and the defendant while admitting the arrears as due pleaded that enhancement was neither possible nor lawful. The plaintiff was absent on the date of the trial and on the refusal of an adjournment, her advocate reported "no instructions". Thereupon the Court purporting to proceed under rule 3 of Order 17 of the Civil Procedure Code passed a decree for the amount of the arrears of maintenance but dismissed the plaintiff's claim for enhancement after examining the registered document itself and hearing the arguments of the defendant's counsel. An application by the plaintiff under rule 9 of Order 9 of the Civil Procedure Code to set aside the order of dismissal of the second part of her claim was dismissed as not maintainable and it was confirmed in appeal. In revision,

Held, Order 17, rule 3, applies only to cases where the parties are present and as only one of the parties was present, the trial Court should have proceeded with regard to the second part of the plaintiff's case under the provisions of Order 17, rule 2, namely, by dismissing that part in default of her appearance. The plaintiff in the circumstances, had two remedies (1) to appeal against the decree of dismissal on merits and/or (2) to proceed under Order 9, rule 9. Hence the plaintiff was entitled to proceed under Order 9, rule 9, the more convenient and cheaper course and have the order of the dismissal of the second part of the claim set aside.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Ellore, dated 3rd December, 1945, in C.M.A. No. 6 of 1945 (I. A. No. 1922 of 1944 in O.S. No. 278 of 1944, D.M.C., Kovvur).

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1. (1933) 64 M.L.J. 732.

*C.R.P. No. 230 of 1946. 25th February, 1947.

D. Narasaraju for Petitioner.

S. Venugopala Rao for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner filed a suit O.S. No. 278 of 1944 in the Court of the District Munsiff, Kovvur. She asked (*a*) for arrears of maintenance and (*b*) for enhancement of the previous rate which had been fixed by a registered document of 1937. The defendant admitting that the arrears of maintenance were due at the old rate alleged that he had made a tender of the amount, namely, Rs. 300 ; with regard to enhancement, however, he said that the document fixed the rate once for all and that no further enhancement was possible or lawful. On the date of the trial the plaintiff was absent and her pleader filed an application for an adjournment but this was dismissed. He then reported no "instructions".

The District Munsiff thereupon passed a decree for Rs. 300, being the amount of the arrears of maintenance at the old rate, together with costs, and then having examined the registered document itself and heard the arguments of the defendant and counsel he held that the plaintiff had no just claim to enhancement and dismissed that part of her suit. In his judgment the learned District Munsiff says :

> "As there is sufficient material available to decide the case on merits, I proceed under Order 17, rule 3 of the Code of Civil Procedure."

In this he was clearly wrong. As long ago as 1917 a Full Bench of this Court held in *Prativadi Bayankaram Pichamma* alias *Mangamma* v. *Kamisetti Sreeramulu*[1], that Order 17, rule 3, Civil Procedure Code, applies only to cases where the parties are present. Here only one party was present and the District Munsiff should have proceeded with regard to the second part of the plaintiff's case under the provisions of Order 17, rule 2, namely, by dismissing that part in default of her appearance.

The plaintiff then applied under Order 9, rule 9, for an order setting aside the order of dismissal of the second part of her claim. The learned District Munsiff dismissed the application saying that the suit was decided on merits and that the petition did not therefore lie.

From this decision she appealed to the Subordinate Judge, Ellore, who in a reasoned judgment came to the conclusion that the only remedy open to the plaintiff in the circumstances indicated above was to prefer an appeal. He also held that the District Munsiff had decided the case under rule 3 of Order 17, Civil Procedure Code, and went on to say that Order 9, rule 9, did not apply.

In this I think he was wrong. This petition must be allowed. So recently as 6th February, 1947, a Bench of this Court consisting of Wadsworth and Govindarajachari, JJ., in Appeal No. 487 of 1945[2] held that in similar circumstances the plaintiff has two remedies : (1) to appeal against the decree passed dismissing the suit on the merits and/or (2) to proceed under Order 9, rule 9, Civil Procedure Code. The plaintiff in this case has chosen to proceed under Order 9, rule 9. This is obviously the more convenient and cheaper course. The orders of the lower appellate Court will be set aside and the petition before the District Munsiff will be restored to file and the matter re-considered on its merits.

This civil revision petition is allowed with costs here and the courts below, the matter having been strongly contested from the beginning by the respondent.

V.S. ——— *Petition allowed.*

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1. (1917) 34 M.L.J. 24 : I.L.R. 41 Mad. 286 (F.B.). 2. (1947) 1 M.L.J. (N.R.C.) 19.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Surisetti Satyanarayanamurthy .. *Petitioner**

v.

Rajanala Gopalarao Naidu .. *Respondent.*

The Madras Tenants and Ryots Protection Act (XVII of 1946), sections 3 and 4—Contest as to occupancy rights by rival claimants—Act has no application to such a case—"Tenants"—Class covered by.

Where in a suit the real and substantial question between the parties was as to who was entitled to the occupancy rights in respect of the suit property, whether it was the plaintiff or the defendants,

Held, there is no provision or even an expression in the Madras Act XVII of 1946 from which it can be gathered that the expression "tenants" used in the Act would cover persons other than the two classes of tenants, namely, the tenants under the Malabar Tenancy Act and tenants of private lands situated in estates and hence the Act does not cover a case of this kind where the contest is between persons each of whom claims to be the occupancy ryot in respect of the suit lands and no relief can be given under the Act.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Ellore, dated 21st October, 1946, in C.M.P. No. 1074 of 1946 in O.S. No. 34 of 1946, etc.

P. Somasundaram and *S. Ramamurthy* for Petitioner.

K. Kameswara Rao, V. Sethumadhava Rao, K. Subba Rao and *T. Venkatadri* for Respondent.

The Court delivered the following

JUDGMENT.—C.M.P. No. 5638 of 1946 is for stay of further proceedings in O.S. No. 34 of 1946 on the file of the Court of the Subordinate Judge of Ellore, pending the disposal of C.R.P. No. 1278 of 1946 of this Court. Interim stay was granted and thereafter it was contended by the petitioner in the Civil Miscellaneous Petition that the statutory stay provided under Madras Act XVII of 1946 had come into operation and both the Civil Miscellaneous Petition and Civil Revision Petition should be stayed. Consequently the Civil Revision Petition and Civil Miscellaneous Petition were directed to be posted together for orders. The Civil Revision Petition itself is against an order holding that section 4 of the Act XVII of 1946 has no application to the case.

The first defendant is the petitioner in the Civil Revision Petition while the plaintiff is the respondent. The suit is for a declaration that the plaintiff alone is the owner of the occupancy rights in the suit lankas, that none of the defendants have any rights of occupancy therein, and that, as such, the plaintiff is entitled to immediate possession with profits for the suit lankas. Those lands have been since placed under the management of a receiver appointed by the Sub-Court and they are in *custodia legis*. The defendants, however, claim to be the real occupancy ryots and they contend that the plaintiff is their landholder and that under the provisions of the Madras Estates Land Act he is not entitled to evict them.

Thus, the real and substantial question between the parties is as to who has got the occupancy rights in respect of the suit property, whether it is the plaintiff or the defendants. Mr. Subba Rao, the learned counsel for the respondent in the Civil Revision Petition urges that Madras Act XVII of 1946 has no application to a case of this description. His argument is that the Act provides for the temporary protection from eviction of two classes of tenants, namely, tenants to whom the Malabar Tenancy Act (1929) applies and tenants of private lands and estates governed by the Madras Estates Land Act. So far as such tenants are concerned, they are protected under section 3 from eviction from their lands by the landlord in pursuance of a decree or order for eviction. With reference to ryots within the meaning of the Madras Estates Land Act Act the only protection that the Act provides is against the sale of their holdings in such estates. Section 3 (*b*) is referred to as showing that the only protection for such ryots contemplated under the Act is the prohibition of the selling of their holdings in pursuance of a decree or order

*C.R.P. No. 1278 of 1946 and C.M.P. No. 5638 of 1946. 16th January, 1947.

for recovery of the rent. There is no provision in the whole Act which confers protection from eviction on a ryot under the Madras Estates Land Act for the obvious reason that under the latter Act no ryot of a ryoti land can be evicted; he has only to prove that he has occupancy rights and he gets absolute protection under the Madras Estates Land Act itself and no further protection was required to be provided under the new Act. Their holdings could, however, be brought to sale for recovery of rent. As possibly the Legislature is contemplating to introduce legislation with regard to the rents the intention was to prevent the sale of a holding until such legislation was passed regulating the rents payable by ryots in estates to the landholder. A close scrutiny of all the sections of the Act very clearly supports the contentions advanced by Mr. Subba Rao. The other side is not in a position to point to any provision or even an expression in the Act from which it can be gathered that the expression "tenants" used in the Act would cover persons other than the two classes of tenants mentioned above, namely, tenants under the Malabar Tenancy Act and tenants of private lands situated in estates.

The second contention advanced by Mr. Subba Rao is that the Act does not cover a case of this kind where the contest is between persons each of whom claims to be the occupancy ryot in respect of the suit lands. In such a case the claim was to be adjudicated upon as to who is the occupancy ryot and he alone is entitled to the kudivaram right. The other person can only be a tenant under an occupancy ryot and such a person is not entitled to any protection whatever under Act XVII of 1946. This contention is equally sound.

I uphold both the objections.

The result will be that C.R.P. No. 1278 of 1946 will be dismissed as also C.M.P. No. 5638 of 1946. The respondent will have his costs in the Civil Revision Petition.

K.C. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AIYAR.

Kandukuri Papamma .. *Appellant**

v.

Kandukuri Narayana and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 11—Prior suit against manager of Hindu family though not described as such—Decision in, how far operates as res judicata *against the other members of the family not impleaded by name—Plea of* res judicata *can be raised for first time in second appeal.*

Hindu Law—Partition—Terms reduced to a document—Absence of registration—Effect—Partition can be proved aliunde *against other members where the party to document was not the managing member of the branch.*

The question of *res judicata* being one of law can be taken for the first time in second appeal. It is not necessary that a suit should be filed against a person as manager of a Hindu family describing him as such for the proceedings to be binding on the other members. Merely because the other members of the family were not parties to the suit by name it does not follow that they are not bound by the decree. If it can be gathered that the suit was directed against the defendant as manager of the family the other members are bound and the decree will operate as *res judicata* against them in any subsequent suit.

Even if as a matter of fact a partition had taken place previously, if its terms are reduced to the form of a document, and that document is inadmissible in evidence for want of registration, oral evidence is not permissible to be adduced to prove the partition. *Subba Naidu* v. *Varadarajulu Naidu*, (1947) 1 M.L.J. 90, referred to. But where a party to such document is not the managing member of his branch then the deed is not operative against the other members of the branch who were not parties to it and there will be no difficulty in proving the partition *aliunde* as against them.

Appeal against the decree of the District Court, Anantapur, in A.S. No. 88 of 1944, preferred against the decree of the Court of the District Munsiff, Gooty, in O.S. No. 163 of 1943.

K. Subba Rao and *C. Kondiah* for Appellant.

Ch. Raghava Rao for Respondents.

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*S.A. No. 1202 of 1945. 26th February, 1947.

The Court delivered the following

JUDGMENT.—The dispute in this second appeal relates to a plot which the plaintiff alleges fell to her share at a partition but which the defendants say has been in their possession having fallen to their share at a partition even during the lifetime of their father. The plaintiff had to file a suit (O.S. No. 99 of 1940) for an injunction in respect of this plot some years before against the first defendant and the representatives of two other branches of the original family of four and in this suit she succeeded on the strength of a finding that the plot had fallen to her share. One of the questions raised is whether this decree is *res judicata.*

The first Court held that the unregistered agreements, Exs. P and P-1, which refer to the allotment of the plot to the plaintiff at a partition, were admissible in evidence and proved the plaintiff's title. It held, however, that the decree in O.S. No. 99 of 1940 did not bind defendants 2 and 3 who were not parties to the suit. On appeal the District Judge did not deal with the question of *res judicata* at all. As regards the admissibility of Exs. P and P-1, he took the view that they were inadmissible in evidence. Hence he dismissed the plaintiff's suit.

It is somewhat doubtful whether Exs. P and P-1 record a past transaction of partition or evidence a contemporaneous arrangement of division. Further, even if as a matter of fact the partition took place previously, as its terms were reduced to the form of a document and that document is inadmissible in evidence for want of registration, oral evidence is not permissible to be adduced. This is the effect of the decision reported in *Subba Naidu* v. *Varadarajulu Naidu*[1].

But on the question of *res judicata* which is raised for the first time now at the hearing of this second appeal and which does not appear to have been taken even before the lower Court, it seems to me that the defendants will find difficulty in furnishing an answer. The judgment in the prior suit is before us and the question being one of law can be taken at any stage. It is not necessary that a suit should be filed against a person as manager of a Hindu family describing him as such for the proceedings to be binding on the other members. It is enough if it could be gathered that he was sued in such capacity. O.S. No. 99 of 1940 was filed against three persons who were apparently the heads of their respective families. Defendants 2 and 3 are the brothers of first defendant. As is pointed out by the District Munsiff, for the purpose of getting rid of the effect of the decree and of the partition a false case of illatom of D-1 has been set up to make it appear that the first defendant was not the manager of the family, he having gone in adoption to another family. Defendants 2 and 3 were not parties to Exs. P and P-1. The first defendant represented them in the agreements. If he was not the managing member of the family, then the deeds are not operative against defendants 2 and 3 and do not bind them and if such were the case there is no difficulty in the plaintiff proving the partition *aliunde* inasmuch as there is no written deed evidencing the partition so far as defendants 2 and 3 are concerned.

Merely because defendants 2 and 3 were not parties to this suit by name it does not follow that they are not bound by the decree. If we are able to find that the suit was directed against the first defendant as manager of the family they are bound. Such was, in my opinion, the nature of the suit. Finding issue (2) in favour of the plaintiff, and against the defendants, I set aside the decree of the lower Court and restore that of the District Munsiff. As the plaintiff is succeeding on a point not raised by her in the memorandum of grounds of second appeal, she will have no costs. No leave.

K.S. *Appeal allowed.*

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1. (1947) 1 M.L.J. 90.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

G. V. Arunachalam Aiyar .. *Petitioner**

v.

Lakshminarasimham and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 22, rules 3 and 9 (2)—Death of appellant—Right to apply to bring his legal representatives on record if limited only to his legal representatives—Maintainability of such an application at the instance of one respondent who has filed cross-objections in the appeal seeking relief against another respondent.

On the death of an appellant, one respondent who had filed cross-objections in the appeal seeking relief against the other respondent filed an application to bring on record the legal representatives of the deceased appellant within the time allowed by law. On an objection by the other respondent that such an application was not maintainable at the instance of a person who was not a legal representative of the deceased appellant,

Held : Where there is no abatement the right to apply to bring the legal representatives of the deceased appellant on record is not limited to his legal representatives and hence there could be no objection whatever to the maintainability of such an application by one of the respondents when there has been no abatement.

While rule 9 (2) of Order 22 of the Civil Procedure Code limits an application to set aside an abatement to the legal representatives of a deceased plaintiff, there is no similar limitation in respect of an application to bring on record the legal representatives of the deceased plaintiff or deceased appellant.

Petitions praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to bring on record minor Nagalakshmi, the illegitimate daughter of K. Periammal the deceased appellant in App. No. 557 of 1945, High Court, Madras (O.S. No. 13 of 1944, Subordinate Judge's Court of Salem), as legal representative of the deceased appellant Nagalakshmi etc.

P. S. Ramachandran for Petitioner.

N. Sivaramakrishna Aiyar for Respondents.

The Order of the Court was made by

The Chief Justice.—This is an application by the second respondent in the appeal who was the second defendant in the suit. The first respondent was the plaintiff and the appellant was the first defendant. The suit was decreed in favour of the plaintiff (first respondent in this Court). The second respondent has filed cross-objections in the appeal seeking to obtain relief against the first respondent.

The appellant died a few months ago, and this is an application by the second respondent to bring on record the legal representatives of the appellant. The application is made within time and there is no question of the appeal having abated when the application was instituted.

It is opposed by the first respondent, the argument being that only the legal representatives of the appellant can make the application, which is not one available at the instance of, in this case, the second respondent. In support of the argument, reference was made to Order 22 rule 9 (2) of the Code of Civil Procedure which limits an application to set aside an abatement to the legal representatives of the deceased plaintiff or others, to whom reference is now not necessary. I can find no similar limitation in respect of an application to bring on record the legal representatives of a deceased plaintiff or a deceased appellant, at the instance of a respondent in an appeal, when there has not been an abatement.

If the appeal abates, it is manifest that the cross-objections filed by the second respondent will not be able to be heard, and he will be prevented from challenging the correctness of the decision of the lower Court. This was laid down in *S. T. M. R. Murugappa Chettiar* v. *Ponnuswami Pillai*[1], a decision of a Bench of this Court.

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*C.M.P. Nos. 5578 and 5579 of 1946. 12th February, 1947.

1. (1921) 41 M.L.J. 904 : I.L.R. 44 Mad. 828.

In my view, there is no objection whatever to the present application and it should be allowed. Since the first respondent opposed the application, he should pay the costs.

This petition and Civil Miscellaneous Petition No. 5579 of 1946 can be placed before the learned Registrar for further action.

Rajamannar, J.—I agree.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

M. L. Verghese .. *Petitioner**

Criminal Procedure Code (V of 1898), section 188 (as amended by Act XVIII of 1923)—Scope and applicability—Pledge of jewels in British India—Criminal breach of trust by pledgee sub-pledging them in Native State—Jurisdiction of British Indian Court to try pledgee without certificate of the Political Agent of that Native State or other prescribed authority.

Section 188, Criminal Procedure Code, as amended in 1923, is not governed or controlled by the preceding sections 179 to 187 but in turn itself governs and controls the same.

A pledgee of jewels in British India who commits a criminal breach of trust by sub-pledging them in a Native State cannot be tried for that offence by the British Indian Court without a certificate of the Political Agent of that State or other prescribed authority as required by section 188, Criminal Procedure Code. The fact that part of the consequences of the offence have ensued within the jurisdiction of the British Indian Court cannot affect the question of jurisdiction.

Sreeramamurthy, In re, (1934) 68 M.L.J. 211 and *Kakrulla Khan*, In re, (1935) 68 M.L.J. 415, referred to.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of South Malabar, dated 16th April, 1946 and passed in C.A. Nos. 23 and 24 of 1946 respectively preferred against the judgments of the Court of the Additional First Class Magistrate of Palghat, in C.C. Nos. 278 and 282 of 1945 respectively.

S. Govind Swaminathan and *Gopinath* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—These are two revision petitions arising out of two different cases in which the petitioner, who was the accused in both the cases, was convicted by the Additional First Class Magistrate, Palghat, under section 409, Indian Penal Code. The convictions, on appeal, were confirmed by the Sessions Judge of South Malabar.

The petitioner was running a bank called the Malabar Central Bank with its head office at Chowghat and a branch office at Orumanayur, both places being situated in British India. The charge against him in both the cases was that he received gold ornaments from different persons by way of pledge and after doing so, sub-pledged them for higher amounts to other banks. According to the prosecution, these amounted to acts of criminal breach of trust as in sub-pledging the jewels, and that for higher amounts, the petitioner must be deemed to have acted with dishonest intention. This view prevailed in both the Courts below. At the appellate stage, an objection was raised to the convictions on the ground that since the sub-pledging had been done by the petitioner with the Savings and Investments Corporation, Limited, at Trichur, which is situated in the State of Cochin, the British Indian Courts had no jurisdiction to try the accused. This objection is based upon the provisions of section 188 of the Criminal Procedure Code as amended by Act XVIII of 1923. The material portion of section 188 runs thus :

"\.... When any British subject commits an offence in the territories of any native Prince or Chief in India .... he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found : Provided that *notwithstanding anything in any of the preceding sections of this Chapter* no charge as to any such offence shall be inquired into in

*Crl.R.C. Nos. 515 and 516 of 1946. 28th February, 1947.
(Crl.R.P. Nos. 495 and 496 of 1946.)

British India unless the Political Agent, if there one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India; and, where there is no Political Agent, the sanction of the Provincial Government shall be required...."

The words italicized were added by the Amending Act of 1923 and the purpose of that amendment will be set forth presently. The learned Sessions Judge negatived this contention relying upon section 181 (2) of the Criminal Procedure Code which is to the following effect:

"The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed."

Referring to this sub-section, the learned Sessions Judge held that the articles which are the subject of the offence were received by the appellant either at Orumanayur or at Chowghat and that consequently the trial Court had jurisdiction. He was of the opinion that in view of the express provision contained in section 181 (2), section 188 had no application and he pointed out that a contrary view would lead to the result that Courts in British India would be absolutely powerless if the offender disposes of property taken from British India in an adjoining Native State. On a consideration of the judicial precedents as they stood before the amendment introduced in the proviso to section 188 of the Code and the scope of the amendment which was enacted expressly for the purpose of overcoming the effect of those decisions and the decisions that have been given after the amendment, I am of opinion that the objection as to want of jurisdiction in the trial Court to try the accused in this matter must be upheld. I would refer only to one of the decisions prior to the amendment. In the *Assistant Sessions Judge, North Arcot* v. *Ramaswami Asari*[1], it was held by Sadasiva Ayyar and Spencer, JJ., in a case where a person *A* entrusted three jewels to the accused at Vellore for sale and the accused pledged two of them in Bangalore and misappropriated the third at Madras contrary to the arrangment that he should return the jewels or their price to *A* at Vellore, that the British Indian Court at Vellore had jurisdiction to try the accused for breach of trust or dishonest misappropriation without a certificate under section 188, Criminal Procedure Code. It is clear from the report of the Select Committee which proposed the amendment to section 188 that the *non obstante* clause was inserted in the proviso to that section expressly for the purpose of getting over the effect of the ruling in the *Assistant Sessions Judge, North Arcot* v. *Ramaswami Asari*[1], and other rulings to similar effect. The Committee said thus:—

"Certain decisions of the Madras High Court seem to make it doubtful whether section 188 is subject to the provisions of sections 179 to 184 and we think it is desirable to clear this up. We are not satisfied that this was the intention of section 188, and in our opinion it is safer, when a man is tried in British India in respect of an offence committed in a Native State, to require the Political Agent's Certificate in every case. The amendment which we propose will make this clear."

After this amendment was effected, we have had a series of decisions of this Court which have held that section 188 as amended is not governed or controlled by the preceding sections 179 to 187 but in turn itself governs and controls the same. I shall refer to two cases. *Sreeramamurthy, In re*[2], is a decision by a single Judge, Pandrang Row, J. There the accused was charged under section 290 of the Indian Penal Code for having committed a public nuisance by arranging a marriage procession with music and by letting off fire-works thereby disturbing the sleep of the people in the vicinity of Frenchpeta, a part of French territory. An objection was raised that the British Indian Court had no jurisdiction to try an offence which was committed in Frenchpeta. It was held that even if section 179, Criminal Procedure Code, was applicable, the case could not be tried without a certificate of the French Political Agent as required by section 188 of the Code. The learned Judge observed:

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1. (1914) 26 M.L.J. 235: I.L.R. 38 Mad. 779. 2. (1934) 68 M.L.J. 211.

"The fact that some of the persons who were annoyed by the music and fire-works were living in British territory would not give jurisdiction to the Magistrate. Even otherwise, and assuming that section 179, Criminal Procedure Code, would apply to a case of this kind, there is another provision in the Criminal Procedure Code, *viz.*, section 188 which provides that notwithstanding anything in the preceding sections of Chapter XV, no charge in respect of any offence committed by an Indian subject of the Crown in any place without or beyond the limits of British India shall be inquired into in British India unless the Political Agent if there is one for the territory in which the offence is alleged to have been committed certifies that in his opinion the charge ought to be inquired into in British India . . . ."

The ruling in *Kakrullahan*, In re[1], was given by a Bench consisting of Curgenven and King, JJ. There it was specifically laid down that a British Indian Court has no jurisdiction under section 188, Criminal Procedure Code, as amended in 1923, to try an offence committed wholly or partly in a Native State, without the certificate of the political agent. The fact that part of the consequences have ensued within its jurisdiction is of no avail. That was a case of commitment and it was held that a commitment made without such certificate was illegal and must be quashed. The consideration urged by the learned Sessions Judge as to the possible result of taking such a view of the law in the matter of encouraging people who have committed such offences to dispose of their property in an adjoining Native State is without much force as in a case of this kind presumably there would be little difficulty in obtaining a certificate from the authority prescribed in the proviso to section 188, Criminal Procedure Code. In any case an *argumentum ab inconvenienti* is of no avail when the provisions of law are sufficiently explicit and imperative.

The petitions are allowed and the convictions of the petitioner in both the cases and the sentences passed on him are set aside.

V. S. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE GOVINDARAJACHARI.

Gopalaswami Ayyar .. *Appellant**

v.

Nataraja Chettiar and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 11—Suit to enforce mortgage by two of the sons of the mortgagee impleading third son as defendant—Decree for plaintiffs' two-third share reserving third son's remedy—Subsequent suit by third son as regards his share—Not barred by res judicata.

For part of the consideration for the sale of immoveable properties the vendee executed a mortgage over some properties in favour of the vendor and his two sons. Later the vendor had another son. After his death two of the sons filed a suit on the mortgage for the whole amount due impleading the third son and the mortgagor as defendants. The Court however passed a decree only for the two-third share due to the plaintiffs and the third son was left with his remedy to recover his one-third share by separate suit. The mortgagor sold the properties and the vendee paid off the decree amount. The third son filed a suit to recover his share under the mortgage and it was contended by the purchaser from the mortgagor that the suit was not maintainable.

Held, that the suit was maintainable. Far from the plaintiff being barred by *res judicata*, it was the mortgagor and his representative who were bound by the former judgment. That the decree in the former suit was not correct in form was no ground for not decreeing the present suit.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge, Mayavaram, in O.S. No. 22 of 1944.

T. V. Muthukrishna Aiyar and *R. Vaidyanatha Aiyar* for Appellant.

A. V. Viswanatha Sastri, R. Viswanathan and *T. R. Srinivasan* for Respondents.

The Judgment of the Court was delivered by

Govindarajachari, J.—The facts necessary for the decision of this appeal may be briefly stated. One Perambala Chettiar and his two sons, one an adult and

1. (1935) 68 M.L.J. 415.

*Appeal No. 349 of 1945. 7th February, 1947.

the other a minor, sold certain lands to the father of the third defendant on 26th January, 1920, for Rs. 46,000. Rs. 34,000 out of the price was paid by the vendee and for the balance of Rs. 12,000 the vendee executed on the same day a deed of simple mortgage mortgaging the properties which he had just purchased. The mortgage (Ex. P-2) was executed in favour of the vendors, namely, Perambala, Kanakasabai, Perambala's son by his first wife and the first plaintiff in the present suit and " a male child unnamed ", who, it is admitted, is the present first defendant. The present second defendant was not then born. The first and second defendants are Perambala's sons by his second wife. Though the mortgage deed was executed in favour of Perambala and his two sons then in existence, it is obvious that it was a mortgage in favour of the joint Hindu family. Perambala died on the 20th November, 1927, undivided from his sons.

On foot of the mortgage the present first and second defendants filed O.S. No. 15 of 1935 in the Court of the Subordinate Judge of Mayavaram impleading Kanakasabai as the first defendant along with the mortgagor's son, the present third defendant and subsequent transferees of portions of the hypotheca from the Official Receiver of East Tanjore in whom the property of the mortgagor had vested on his insolvency, the Official Receiver himself being the ninth defendant. In paragraph 7 of their plaint the plaintiff alleged that they alone were entitled to get the entire amount due on the mortgage as their father Perambala and their elder brother, Kanakasabai had discharged their own personal debts with the amount of Rs. 34,000 which had been received under the sale deed referred to above and also as they had sold :

" the entire moveable properties like jewels, etc., existing in the family and utilised the amount for their personal use and as they had received amounts in several other ways."

There was a further allegation that the entire amount mentioned in the suit mortgage deed :

" was accordingly set apart for the share of the first plaintiff in which however, the second plaintiff though born subsequent to the execution of the mortgage was entitled to participate."

In paragraph 15 they stated that the first defendant (Kanakasabai) did not agree to join in the filing of the suit and claimed that :

" if for any reason it was found that the plaintiffs are not entitled to exclusively get the entire amount of the suit mortgage deed in this suit, it is necessary that a decree should be passed in favour of the plaintiffs at least for a two-third share in the amount ot the suit mortgage deed."

A further alternative was mentioned in paragraph 16 wherein the plaintiffs asked that a decree should be passed :

" both in favour of the plaintiffs and the first defendant if the Court should be of the opinion that a decree cannot be passed in favour of the plaintiffs alone for the entire amount of the suit mortgage and if it is found that a decree should jointly be passed in favour of the first defendant also."

Kanakasabai's written statement started with the averment that he was the undivided brother of the plaintiffs but added that he was entitled to a one-third share in the suit mortgage amount. The plaint allegation that the sale amount was utilised for discharging the personal debts of the first defendant and of Perambala was denied, and it was stated that the debts that were discharged were borrowed for family necessity. The allegation about the sale of jewels and the appropriation of the sale proceeds by this defendant and his father were also denied, and it was asserted that the suit mortgage amount was common ancestral property and that:

" the two plaintiffs and this first defendant were each of them entitled in law to a one-third share in it."

The written statement proceeded to aver that :

" the plaintiffs cannot raise any objection whatever in this suit to the decree which may *prima facie* be passed in favour of this defendant on the mortgage."

This was repeated in paragraph 11 wherein the defendant prayed that :

" this Court may be pleased to direct that the decree which shall be passed according to the suit mortgage deed may be passed both it favour of the plaintiffs and this defendant."

The 12th defendant in the suit claimed certain priorities to which however no detailed reference is necessary.

The suit had a curious disposal. The issues material for the present discussion were set down as issues 2, 7 and 11. They were as follows :

2. Whether the first plaintiff is entitled to the entire mortgage money as claimed by him or he is entitled only to a half share as contended by the 12th defendant or, to a one-third share as contended by the first defendant ?

7. Whether the plaintiffs are not entitled to claim the entire mortgage amount in this suit and whether a partition is the proper remedy ?

11. Whether the first defendant is not entitled to a decree with plaintiff ?

On the second issue the Court held that " the plaintiffs are entitled to two-third and the first defendant to one-third as claimed by him." Paragraph 18 of the judgment which dealt with the seventh issue is very obscure, and there has been considerable discussion before us as to its exact meaning. It is as follows :

" It is not necessary that plaintiffs should sue for partition. They can sue for the mortgage money or any share thereof but if first defendant wants to work out his remedy, he must go to suit especially having regard to the fact he has not come forward to substantiate his claim and contentions. I do not suppose that plaintiffs can be allowed a full decree on security as claimed by them driving first defendant to a separate suit for his share against them. Plaintiffs will be entitled to a decree only to two-thirds of the amount claimed."

On a close reading of this paragraph in the light of the pleadings of the parties it seems to us that the learned Subordinate Judge first held that the plaintiffs could sue for two-thirds of the mortgage amount without previously filing a suit for partition between themselves and their brother, the first defendant. It was next held that the first defendant should not be given his share of the mortgage amount as he had failed " to substantiate his claim and contentions", whatever that might mean. A suggestion was evidently made that a decree for the entire amount might be passed in favour of the plaintiffs subject to their giving security for satisfying the first defendant in respect of this share, the first defendant being directed to establish his right to such a share by a separate suit against the plaintiffs. The suggestion evidently did not meet with the approval of the learned Subordinate Judge. He therefore directed a decree to be passed in favour of the plaintiffs for only two-thirds of the mortgage amount.

On issue 11, the learned Subordinate Judge remarked that the

" first defendant is not entitled to a joint decree along with the plaintiffs. As a matter of fact he has not come forward to urge for it either."

It is obvious that here the learned Subordinate Judge was wrong, as the first defendant did ask for a joint decree to be passed in favour of himself and the plaintiffs.

The decree drawn up in pursuance of this judgment first declared that the amount due to the plaintiffs for their two-third share on the mortgage including interest and costs amounted to Rs. 17,738-15-0 as calculated up to the 30th June, 1936, which was the date of the decree. Three months' time was given for payment. There was a direction that the defendants should pay into Court on or before the 30th day of September, 1936, the amount previously mentioned together with subsequent interest, with a further direction as to interest on the aggregate sum from 30th September, 1936, till realisation. The decree then proceeded to provide in paragraph 2, sub-paragraph (*ii*), (leaving out the immaterial portions)

" that on such payments . . . the plaintiffs shall bring into Court all documents in their possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendants . . . . and the plaintiffs shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all encumbrances created by the plaintiffs."

Paragraph 3 of the decree stated that in default of payment as aforesaid, the plaintiffs may apply to the Court for a final decree for the sale of the mortgaged property. Paragraph 4 dealt with the application of the sale proceeds, and paragraph 5 reserved to the plaintiffs the right to apply for a personal decree if the amount realised by the sale should be insufficient to pay the plaintiffs in full.

Neither the first defendant Kanakasabai nor the mortgagor's son filed an appeal against that decree and judgment ; nor did either of them file a memorandum

of cross-objections though they had the opportunity of doing so when the 12th defendant filed an appeal in the High Court impleading them as respondents.

It appears that the amount due to the decree-holders in O.S. No. 15 of 1935 was deposited into Court by the fourth defendant in the present suit who purchased some of the hypothecated properties.

The present suit is by Kanakasabai, the eldest son of Perambala and the first defendant in the previous suit, for recovery, by sale of the hypotheca, of Rs. 9,530 being one-third share of the amount due on the mortgage deed of 26th January, 1920. Kanakasabai's younger brothers are impleaded as defendants 1 and 2 and the mortgagor's son as the third defendant. Defendants 4 to 8 are subsequent alienees. The suit was first filed *in forma pauperis* and was numbered as O.S. No. 13 of 1943. There was a civil revision petition to this Court challenging the correctness of the order granting leave to the plaintiffs to sue *in forma pauperis*. By an order made in an interlocutory application for stay during the pendency of the revision petition the Court below was directed to go into the question whether the suit was barred by reason of the judgment and decree in O.S. No. 15 of 1935. The lower Court held on 11th November, 1943, that it was so barred and relying on that finding, Byers, J., allowed the civil revision petition and set aside the order permitting Kanakasabai to sue *in forma pauperis*. Kanakasabai thereupon paid the necessary court-fee, and the suit was then numbered as O.S. No. 22 of 1944. The fourth defendant was the contesting defendant and he contended that the present suit is barred in consequence of the decree and judgment in O.S. No. 15 of 1935 and also by reason of the order, dated 11th November, 1943, in O.S. No. 13 of 1943. These objections were overruled by the lower Court but are again urged in this appeal on behalf of the fourth defendant who is the appellant.

The second of the objections may be shortly dealt with. The contention is that O.S. No. 22 of 1944 is merely a continuation of O.S. No. 13 of 1943 which commenced when the plaint was filed *in forma pauperis* on 26th September, 1942, and that the order, dated 11th November, 1943, passed in the course of the suit is *res judicata* in the later stages of the same suit and that it was not open to the Subordinate Judge to hold as he has now held contrary to the order, dated 11th November, 1943, that the decree and judgment in O.S. No. 15 of 1935 constitute no bar to the maintainability of the present suit. But if the Judgment under appeal is assailed on that ground it would be quite open to the respondents to show in the present appeal itself that the order of 11th November, 1943, is itself wrong. Mr. Muthukrishna Aiyar, advocate for the appellant, therefore conceded, and in our opinion rightly, that the second objection has no independent existence and that the real question to be decided is whether the first plaintiff lost his right to recover his share of the mortgage amount in consequence of the decree and judgment in O.S. No. 15 of 1935, the appellant's contention being that the plaintiff so lost it. It is pointed out on behalf of the appellant that Kanakasabai, his co-mortgagees and the mortgagor were all parties to that suit, and it is argued that if Kanakasabai's rights were not properly safeguarded by that judgment and decree he should have appealed therefrom and got them set right, and not having done so, he is now precluded from pursuing his rights, which, according to the argument, had to be put forward and provided for only in that suit.

In support of this argument two lines of decisions are relied upon. The first group deals with the frame of a suit by one of several co-mortgagees to enforce the mortgage when his co-mortgagees are not prepared to join him as plaintiffs, the constitution of such a suit as to parties, the relief to be prayed for, the court-fee payable on such a plaint and the value for purposes of jurisdiction of a suit so framed. The leading case in this regard is the decision of the Privy Council in *Sunitibala Debi* v. *Dhara Sundari Debi Chowdhurani*[1]. In that case there was a mortgage of an estate to secure two sums of Rs. 80,000 respectively payable to two mortgagees. One of the mortgagees sued on the mortgage impleading the mortgagor, the other

1. (1919) 37 M.L.J. 483 : L.R. 46 I.A. 272 : I.L.R. 47 Cal. 175 (P.C.).

mortgagee and a prior mortgagee of the estate asking for payment of Rs. 80,000 due to her with interest and the sale of half of the mortgaged property. The High Court of Calcutta held that it was not possible for the plaintiff to obtain partial relief upon such a mortgage and granted permission to the plaintiffs to make the necessary amendments to the plaint and sent the order back for rehearing after the amendments were made. The Privy Council first held that the mortgage clearly effected the conveyance of the estate to the mortgagees as tenants in common and that it was not a mortgage to each mortgagee of a divided half but a conveyance to them of the whole property. Dealing with the case on that footing, the Privy Council stated as follows as to how a suit is to be framed in regard to such a mortgage :

> " Where a mortgage is made by one mortgagor to two tenants in common, the right of either mortgagee who desires to realise the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage-decree, which would provide for all the necessary accounts and payments, excepting that there could be no judgment for a sum of money entered as between the mortgagee-defendant and the mortgagor. So far, therefore, as this appeal depends on maintaining the correctness of the form of the proceedings, it must fail. The proceedings were wrong in form, but were capable of being amended so as to constitute a properly framed suit. It was within the competence of the Court, to make such an amendment, and indeed it was their clear duty to do it, if thereby delay and expense would be avoided. In their Lordships' opinion, the amendment of the plaint as directed by the High Court is not appropriately worded and they consider that the trial Judge should on the rehearing of the suit make such amendments as may be necessary and proper."

The decision in *Kailasa* v. *Sundaram*[1], took the matter one step further. It first affirmed the proposition that one of several co-mortgagees who are in the position of tenants in common can sue to recover his own share of the mortgage provided that he makes his co-mortgagees defendants if they refused to join him as plaintiffs relying for this purpose on the decision in *Sunitibala Debi* v. *Dhara Sundari Debi Chowdhurani*[2], and on the decision of the Madras High Court in *Atchamma* v. *Subbarayudu*[3]. The question of the Court-fee payable in and the jurisdictional value of such a suit was then considered. While dealing with this question it was pointed out that a co-mortgagee suing alone for his share must ask for the preliminary mortgage decree in respect of the entire amount and that a proper decree in such a case should provide for all the necessary accounts and payments although a defendant mortgagee could not ask for judgment in his favour. This can only mean that the plaintiff must ask the Court to decide what is due on the mortgage as a whole and to fix a period of redemption of the mortgaged property in its entirety, that there can be no redemption in part and that the plaintiffs cannot get his share until the mortgagor has paid into Court what he owes on the mortgage or the mortgaged properties have been sold under the preliminary decree. The learned Judges therefore concluded :

> " In these circumstances it seems to us that the primary claim can only be taken to be the enforcement of payment of the full mortgage debt, which means that the plaint must be stamped accordingly."

As a corollary they further held that the proper Court to try the suit is the Court having the necessary pecuniary jurisdiction to entertain a suit of the value of the entire mortgage. The question as to what would be the proper course for a mortgagee defendant to take to recover his share of the moneys brought into Court as the result of a suit by a co-mortgagee was left open for future decision.

The case in *Matilal Datta* v. *Bejoy Lal Chakrabarti*[4], which was next cited on behalf of the appellant followed the decision of the Privy Council in *Sunitibala Debi* v. *Dhara Sundari Debi Chowdhurani*[2], and emphasised that the preliminary decree must specify the entire amount due on the mortgage as at the date of grace and not merely what is found due on the plaintiff's share at that date and direct the sale of the entire mortgaged premises in default of payment of the same. How the rights of the parties are to be worked out if the mortgagor pays into Court the total amount found due by the preliminary decree or if he defaults in making the said

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1. (1941) 2 M.L.J. 986 : I.L.R. 1942 Mad. 488.
2. (1919) 37 M.L.J. 483 : L.R. 46 I.A. 272 : I.L.R. 47 Cal. 175 (P.C.).
3. (1903) 15 M.L.J. 406.
4. I.L.R. (1943) 1 Cal. 59.

payment and there is consequently a sale of the mortgaged property was considered in detail. It is pointed out that if the sale fetches a price which is insufficient to recover the amount of the peliminary decree the plaintiff mortgagee will be paid only *pro rata* and that he can obtain a decree under Order 34, rule 6, for the balance of his dues provided that he is otherwise entitled to such a decree. In regard to the rights of the mortgagee defendants the learned Judge made the following reservation :

> " Whether such co-mortgagees would be able to withdraw their share in the surplus sale proceeds by applications in that suit on payment of proper Court fees, or will have to institute suits for the purpose is a point on which there is divergenee of opinion (see for instance *Lachmi Narain* v. *Baburam*[1], and *Seth Bansiram Jashamal* v. *Gunnia Naga Iyer*[2]). On that question we do not express any opinion, as it is not necessary at this stage."

On the question of the Court fee payable on a plaint by one of several co-mortgagees the Calcutta High Court held in the above decision differing from the view taken in *Kailas* v. *Sundara*[3], to which however they made no reference, that it is sufficient if Court fee is paid on the plaintiff's share of the mortgage amount. This decision however emphasised that it is one of the essential conditions of such a suit that the plaintiff must ask for the usual mortgage decree which must provide for all necessary accounts and payments in respect of the whole of the mortgage debt, that is to say, there must be a prayer for sale of the entire mortgage premises, if the mortgagor failed to pay into Court within the period of grace the amount that may be found due in respect of the entire mortgage debt.

The appellants also cited the case in *Ram Sarup* v. *Kunjilal*[4], and *Ramchandra Iyer* v. *Sivarama Iyer*[5]. In the former case a Bench of the Allahabad High Court held that one of several mortgagees cannot maintain a separate suit for recovery of his share of the mortgage debt even though he may abandon his security. In the course of their judgment they observed that,

> "As regards a suit brought by one of several mortgagees the point is well settled in view of the pronouncement of their Lordships of the Privy Council in *Sunitibala Debi* v. *Dhara Sundari Debi Chowdhurani*[6], the only proper course is for the co-mortgagee to implead the other mortgagees as defendants and sue for a decree for the entire amount on the sale of the entire mortgaged property. He cannot get a decree for his share of the mortgage debt or a sale of a part of the mortgaged property. It seems to us that the same principle applies even where one of the mortgagees chooses to abandon the security."

In our opinion this decision is somewhat inconsistent with the decision of the Privy Council which while insisting that the co-mortgagee should be impleaded and that a decree for the fixation of the entire amount and its realisation by a sale of the mortgaged property should be asked for, still ruled that the plaintiff can get a decree for his share of the mortgage. It is true that a part alone of the mortgaged property cannot be sold and also that in order to work out the right of the plaintiff in such a suit the entire amount due on the mortgage should be first ascertained. It is however open to the Court to direct payment out to the plaintiff of his part of the mortgage amount and in fact, that is all that could be done according to the Privy Council decision as no decree can be passed in favour of the co-mortgagee defendant for his share of the mortgage amount.

The decision in *Ramachandra Aiyar* v. *Sivarama Aiyar*[5], is by a single Judge of this Court and purports to follow the decision of the Allahabad High Court just referred to. There are certain observations in this judgment with which we are not in agreement. It was pointed out in *Kailas* v. *Sundra*[3], that they are open to criticism. We therefore deem it unnecessary to discuss it any further.

On behalf of the respondent Mr. Viswanatha Sastri cited the decision in *Lachminarain* v. *Baburam*[1]. Except in one respect this decision did not carry the discussion very much further than *Sunitibala Debi* v. *Dhara Sundari Debi Chowdhurani*[6], *Kailas* v. *Sundara*[3], and *Matilal Datta* v. *Bejoy Lal Chakrabarti*[7]. Dealing with the

1. 1935 All.L.J. 749 : 154 I.C. 437.
2. (1930) 59 M.L.J. 928.
3. (1941) 2 M.L.J. 986 : I.L.R. 1942 Mad. 430.
4. 1935 All.L.J. 198.
5. (1936) 44 L.W. 502.
6. (1919) 37 M.L.J. 483 : L.R. 46 I.A. 272 : I.L.R. 47 Cal. 175 (P.C.).
7. I.L.R. (1943) 1 Cal. 59.

the rights of a defendant mortgagee this decision laid down that he will not be entitled to be paid unless there is some amicable settlement between him and the mortgagor and that otherwise he will have to bring a suit against the mortgagor just as the other mortgagee and that if a sale of the property had already taken place his charge will fasten on the balance of the sale proceeds which is held by the Court as substituted security.

As is apparent from the above discussion it seems to us that the law as to how a suit by one of several co-mortgagees is to be framed is fairly clear. It is also clear that the judgment and decree in O.S. No. 15 of 1935 did not proceed on the basis on which they should have proceeded according to the above decisions, the most material deviation being that the amount that was declared to be payable was only the two-thirds that was due to the plaintiffs together with interest and costs and not as it should have been the entire amount due in respect of the mortgage. That the decree and judgment therefore proceeded upon a defective basis may be readily admitted but what we are really called upon to decide in this case is whether by reason of the defective character of the decree and judgment the first plaintiff's rights were extinguished as the appellant contends, or left unaffected as is contended on behalf of the respondents. The decisions we have so far dealt with are concerned only with pointing out how the plaint and the decree in a suit properly constituted and properly tried should run. None of them is of any help in deciding as to the consequences of a defective suit and a defective decree.

We are invited by the appellant to hold that since there was no provision in the decree in O.S. No. 15 of 1935 for the payment by the mortgagor of the entire amount due under the mortgage and there was a direction only that two-thirds of that amount should be paid, the claim as to the remaining one-third must be taken to have been wiped out. We do not think this necessarily follows. On a fair reading of the judgment and decree it seems to us obvious that the Court did not intend or purport to deal with the right of the present first plaintiff to recover his one-third of the mortgage amount. It was left out to be dealt with in future in a suit to be filed by him. The mere fact that this was not the best or even a proper way of dealing with the rights of the parties does not justify the conclusion that what the Court deliberately left out or reserved for future determination must be taken to have been negatived.

In support of his argument that the extinguishment of the first plaintiff's mortgage is the necessary though perhaps unintended result of the previous decree and judgment, Mr. Muthukrishna Aiyar, advocate for the appellant relied upon another line of decisions to which we shall immediately refer. The first of them is the decision in *Kanhailal* v. *Jwala Dei*[1], the headnote in that case runs as follows :

> "One of two joint mortgagees sued for her moiety of the mortgage debt and obtained a decree for sale of the whole mortgaged property. The other mortgagee would not join as plaintiff in that suit and was accordingly made a defendant. Subsequently the other mortgagee sued the mortgagor for recovery of his moiety of the mortgage debt by sale of the whole mortgaged property. Held that such a suit would not lie."

The material difference however between that case and the present one is that there was in our case no Court sale of the hypotheca as in the case with which the Allahabad Judges were concerned. It is therefore unnecessary to consider what the consequences would have been if there had been such a sale. It will be recalled that the fourth defendant, the purchaser by private sale of a portion of the hypotheca from the mortgagor paid off the amount due to the decree-holders in O.S. No. 15 of 1935 and a sale through Court was consequently unnecessary. In the events that have happened, the relevant paragraph of the decree is paragraph 2 (*ii*) which provides that on the payment of the amount previously specified the plaintiffs shall if so required, reconvey or retransfer the said property free from the said mortgage. The words "the said mortgage" may no doubt be suggestive of the mortgage dated 26th January, 1920 in its entirety ; but if regard is had to the fact that the plaintiffs were, by that very decree, declared to be entitled to a two-

1. 1896 A.W.N. 147.

third share in the mortgage it would not be unreasonable to construe those words as indicative of the plaintiffs' interests in the suit mortgage. As the advocate for the respondents rightly points out, the plaintiffs could not convey anything more than what they had, namely, their two-third share in the mortgage.

The cases in *Ellarayan* v. *Nagaswami Iyer*[1] and Ex parte *Fewings* in re *Sneyd*[2], were next cited on behalf of the appellant to support the argument that the rights put in suit in O.S. No. 15 of 1935 were merged in the judgment and decree and are no longer outstanding. In *Ellarayan* v. *Nagaswami Iyer*[1], there was a preliminary decree for sale on a mortgage. The mortgagor failed within the time fixed in the decree to pay up the amount due under the mortgage and a final decree for sale was passed. The mortgagee however did not execute the final decree and continued in possession. It was held that the mortgagor could not institute a suit for redemption against the mortagee, following the rule of *res judicata* laid down by the Full Bench in *Vedapurati* v. *Vallabha Valia Raja*[3]. It was pointed out on behalf of the respondents that the correctness of the last mentioned decision was doubted in *Viroopakshan* v. *Chembu Nayar*[4], in view of a decision given by the Privy Council meanwhile in *Ragunath Singh* v. *Hansraj Kunwar*[5]. It seems to us unnecessary to discuss the implications of the decision in *Vedapurati* v. *Vallabha Valia Raja*[3], or its correctness or the extent to which the decision in *Ellarayan* v. *Nagaswami Iyer*[1], can be sustained on its own reasoning and apart from its reliance on *Vedapurati* v. *Vallabha Valia Raja*[3]. It is obvious that in the case in *Ellarayan* v. *Nagaswami Aiyar*[1], the right of redemption of the mortgagor was intended to be and was dealt with. It was directly the subject of adjudication. That being so, it was held that the rule of *res judicata* as pronounced in *Vedapurati* v. *Vallabha Valia Raja*[3], barred a second suit in which again the mortgagor's right of redemption was sought to be brought into issue. As we have already observed, there was in O.S. No. 15 of 1935 no adjudication on the rights of the present first plaintiff which were deliberately left out of consideration.

In Ex parte *Fewings*, In re *Sneyd*[2], a mortgagee sued his mortgagor on the covenant in the mortgage for the repayment of the principal sum with interest thereon. It was held that the mortgagee was, as from the date of the judgment, entitled only to interest at the judgment rate of four per cent and was not entitled to interest at the rate of five per cent as provided in the covenant, as the covenant became merged in the judgment. This again is a case where the right in question was dealt with by the judgment which altered the position of the parties as creditor and debtor into that of decree-holder and judgment-debtor with the necessary consequence that the contract rate of interest could no longer be claimed after the judgment was given. The case we are concerned with is wholly unlike the case in Ex parte *Fewings*, In re *Sneyd*[2], because the rights that are now sought to be enforced are altogether outside the scope of the decree which was given in the previous suit.

On behalf of the respondents Mr. Viswanatha Sastri argued that the joining of a party to a mortgage suit in order to satisfy the requirements of the processual law does not necessarily mean or imply that the right of that party is concluded by the decree and he has cited by way of analogy the instance of a suit for sale by a first mortgagee impleading a puisne mortgagee, in which the decree usually provides for the payment, out of the sale proceeds, if there is to be a sale, firstly to the prior mortgagee and then to the extent of any surplus that may remain to the second mortgagee. If the first mortgagee is paid outside Court the second mortgagee cannot execute the decree for the realisation of the amount due to him and must file a separate suit. It is however unnecessary to invoke any such analogy as the right of the first plaintiff was not the subject of even a declaration in O.S. No. 15 of 1935 and, in our opinion, it is not open to the mortgagor or to the fourth

1. (1926) 50 M.L.J. 612 : 49 Mad. 691.
2. (1883) 25 Ch.D. 338.
3. (1901) 12 M.L.J. 128 : 25 Mad. 300 (F.B.).
4. (1937) 1 M.L.J. 83 : I.L.R. 1937 Mad. 545 (F.B.).
5. (1934) 56 All. 561 (P.C.).

defendant who claims under him to refuse to abide by that judgment when it proceeded, even if it be erroneously, to leave the rights of the first plaintiff untouched.

The decision in *Vijayabhushanammal* v. *Evalappa Mudaliar*[1], cited by the advocate for the respondents seems to us to be helpful. It was held in that case that there can be a severance of the interests of several mortgagees to a mortgage not only with the consent of the mortgagor as contemplated by section 67 (6) of the Transfer of Property Act, but also where such severance is effected by a decree of Court binding the mortgagor. Applying that principle it is claimed by the respondents that there was such a severance of the interests of the first and second defendants on the one hand and the first plaintiff on the other, by the decree in O.S. No. 15 of 1935.

The argument on behalf of the appellant seems to us to import the consequences of a decree which should have been passed in accordance with the principles laid down in *Sunitabala Debi* v. *Dhara Sundari Debi Chowdhurani*[2] and the other cases to which we have already adverted, into a case where the decree and judgment proceeded upon entirely different lines. The mere fact that neither the decree nor the judgment proceeded as they should have done, does not, in our opinion, *ipso facto*, lead to the extinguishment of those rights, which would no doubt have been extinguished if there had been a proper adjudication and if a proper decree had been drawn up. It seems to us that in such a case the rights of the parties fall to be decided in the light of and on an examination of the scope of the adjudication contained in the judgment and of the terms of the decree as it is actually worded.

We are not prepared to subscribe to the proposition that the right of a co-mortgagee defendant is extinguished automatically on the passing of a decree in favour of the plaintiff co-mortgagee irrespective of the nature of the judgment given and the language of the decree passed in it and irrespective of whether or not the right of the co-mortgagee was the subject of adjudication. There is, in our opinion, no principle or binding authority in support of such a proposition. We have therefore come to the conclusion on an examination of the judgment and decree in O.S. No. 15 of 1935 and having regard to the payment of the said decree outside Court by the fourth defendant, that the right of the first plaintiff is in no way affected or extinguished.

We accordingly dismiss the appeal with costs of respondents (the legal representatives of the deceased first plaintiff).

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL AND MR. JUSTICE SHAHABUDDIN.

Yelamanchili Venkatadri and another ... *Appellants**

v.

Vedantam Seshacharyulu and others ... *Respondents.*

Religious endowment—Temple—Grant of lands to—Nature of—Archakas in long possession of such lands—Legal implications of such possession—Adverse rights, if could be acquired against the institution—Right of archakas to be remunerated for the services—Nature and limits of.

Where it is clear from the inam statement and inam register that the grant of lands was to a temple, the mere fact that the income from the property and the assessment on it are shown as the same is not sufficient to displace the inference that the grant to the temple was of both the warams.

In a suit by the trustees of the temple for a declaration that such properties belonged to the temple and for ejectment of the archakas who were in possession and enjoyment of them, the latter pleaded that the lands were archaka inams and that in any case by usage and custom they had acquired a right to enjoy the property so long as they were willing to perform the nitya naivedya deeparadhana services to the temple required from archakas and that the suit was barred by limitation.

Held: As the grant was found to be to the temple, there can be no question of the archakas acquiring any proprietary rights in the lands as against the temple. Whatever the origin of their possession may have been they must be held to have been in possession in a fiduciary capacity. Though the

1. (1914) I.L.R. 39 Mad. [illegible]
2. (1919) 37 M.L.J. 483 : L.R. 46 I.A. 272 : I.L.R. 47 Cal. 175 (P.C.).

* Appeal No. 846 of 1945. 24th January, 1947.

archakas were entitled to remuneration for their services, as the properties belonged to the temple, they were not entitled to appropriate for themselves any surplus there may be after the expenses of the particular services which they render have been met. As they have no title to the land or to the surplus income, the question whether they should in fact be left in possession of the properties is an administrative matter and is not a question for judicial decision. In the circumstances, no inference could be drawn of any usage which should be recognised that the archakas were entitled to be remunerated from the whole of the surplus income of the lands merely because the temple owns other lands.

If the case had been between the temple and a third party, it might be that the plaintiffs would have to show that the temple had been in possession within twelve years of the suit. Once, however, it is held that the property belonged to the temple, there can be no question of adverse possession as between the temple and the archakas. The archakas were in possession of the properties in a fiduciary capacity and cannot have prescribed for it and, therefore, there was no bar of limitation.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam, dated 31st January, 1945 and passed in O.S. No. 65 of 1942.

P. Satyanarayana Rao and *Y. G. Krishnamurthi* for Appellants.

M. S. Ramachandra Rao for Respondents.

The Judgment of the Court was delivered by

Happell, J.—This is an appeal from the judgment of the Subordinate Judge of Masulipatam, dated 31st January, 1945, by which he dismissed O.S. No. 65 of 1942 on the file of his Court. The appellants were the plaintiffs in the suit and are the trustees of the temple of Sri Vuddandaraya Venugopalaswami Varu of Pedda Maddali. They were appointed trustees on 29th March, 1940, in pursuance of a scheme framed by the Hindu Religious Endowments Board in 1939 for the management of the temple, and they brought the suit to eject defendants 1, 2 and 4 from certain properties and for a declaration that these properties belonged to the temple. The first and second defendants are the archakas of the temple, the third defendant is the hereditary trustee and the fourth defendant was impleaded as a lessee under defendants 1 and 2.

A number of issues were framed in the suit based on the contentions of the parties. Arguments in appeal, however, have been confined to the questions whether the grant of the properties in suit was to the temple and whether, if so, the defendants could be entitled, for any reason, to remain in possession. On those questions the plaint averments are that the properties belonged to the temple, and that defendants 1 and 2 had only been allowed to be in possession at the will of the plaintiffs and their predecessors as remuneration for their services. Defendants 1 and 2, on the other hand, maintained that the lands are archaka service inams or that, in any case, by usage and custom, they had acquired a right to enjoy the property so long as they were willing to perform the services to the temple required from archakas. The third defendant supported the case of defendants 1 and 2. The fourth defendant stated that he had handed over possession to the plaintiffs and was not a necessary party to the suit.

The properties in question in this appeal consist of the properties shown in the A and A-1 and B schedules attached to the plaint. Different considerations arise with regard to the B schedule properties and they will be dealt with separately. The A and A-1 schedule properties now consist of about 16 acres of wet lands, but the conversion of the lands from dry to wet appears to have been comparatively recent. The temple owns a further 26 acres of land in another village, but it is not disputed that these lands belong to the temple and that the income from them is devoted to temple purposes. It is clear from the Inam Statement (Ex. P-5) and the Inam Register (Ex. P-1) that the grant of the A and A-1 schedule properties was to the temple. The learned District Judge admitted this but for reasons, which will be examined in due course, he was of opinion that the grant was of the melwaram interest only. This opinion, however, made no difference to the reasoning on which his final conclusion was based as he was also of opinion that, although the initial grant had been of the melwaram interest only, the kudiwaramdar—one Tadanki Baskarayya Garu—had later made a gift to the temple of the kudiwaram rights. As regards the question of possession he did not believe the evidence for the plaintiffs that the trustees had ever

been in possession of the lands, and he accepted the evidence for the defendants that the archakas had been in possession and enjoyment of the lands at least since the year 1905. He also seems to have been of opinion, although the judgment is not altogether clear on this point, that the archakas should be deemed to have been in possession from time immemorial for the reason that such evidence as there was showed that they had been in possession for any period to which the evidence related. He did not accept the contention that a case of lost grant should be presumed from the long possession of the archakas because, in his view, the grant of both warams had in fact been to the temple and not to the archakas; but, nonetheless, after the citation of a number of authorities, he finally concluded that when it is established, as in the present case, that the archakas have been in very long possession of the property it must be presumed that they have been in possession legally and that they cannot be dispossessed as long as they carry out the purposes for which they were put in possession of the property. Earlier in his judgment at the end of paragraph 24 he had held that as the archakas were in possession of the suit properties and were doing the service of nitya nivedya deeparadhana, to that extent they must be deemed to be the trustees and the plaintiffs cannot dispossess them.

It has been conceded before us that the document Ex. P-7 on which the learned Subordinate Judge based his finding that there had been a grant to the temple of the kudiwaram rights in the property was not admissible in evidence, and it is not suggested that there is any other evidence of a separate grant of the kudiwaram rights. The conclusion that the initial grant to the temple was of the melwaram rights only is based on the fact that the assessment of the property as shown in column 7 of the Inam Register is the same as the income derived by the Inamdar from the property as shown in the Inam statement taken with an unreported decision of a Bench of this Court in Appeal No. 213 of 1942, decided by Wadsworth and Patanjali Sastri, JJ. It is argued for the defendants that if the grant to the temple was of the melvaram interest only it should be presumed, in the absence of evidence to the contrary, that the grant of the kudivaram interest was to the archakas who have all along been in possession. In our opinion, the view that the melwaram rights only were granted to the temple cannot be sustained. The facts of the case to which the decision in Appeal No. 213 of 1942 relates relied on by the Subordinate Judge differ in important respects from the facts in the present case. In the case decided by Wadsworth and Patanjali Sastri, JJ., the entry under the heads "particulars of the present family" and "particulars of the present enjoyment" are "P. Vallabhacharyulu the archakas and paracharakas" and "Sri Gopalaswami Varu, Archaka P. Vallabhacharyulu", respectively, and the fact that the revenue and assessment were the same was only one of the factors in the conclusion that the grant was to the archakas. In the present case there is no mention of the archakas in the Inam Statement or the Inam Register, and the grant is clearly shown as being to the temple alone. Moreover, the following note was appended by the Inam Commissioner to the Register of Inams (Ex. P-1):

"In these two cases the present zamindar remitted the kattubadi on the Inams in fasli 1252, all the registers and accounts show the Inams to have been from the beginning kattubadi. But in the karnam's daul of fasli 1212 (the date of the permanent settlement) which is a genuine account these Inams are among free Inams and must be considered as having been deducted in the assets of that settlement. I, therefore, propose treating them as free";

and the order under column 23 is

"As they were free at the permanent settlement and the subsequently imposed jodi has since been remitted by the zamindar they can be treated as free."

It is clear that the Inam could not from the beginning have been a kattubadi Inam if the grant was of the melwaram only, and the mere fact that the income from the property and the assessment on it are shown as the same is not sufficient to displace the inference that the grant to the temple was of both warams. The income derived from 16 acres of dry land may not have been considerable in 1860, and as the Inam was to be treated as free a precise calculation of the appropriate assessment may not have been regarded as important. In our opinion

therefore, the grant to the temple was of both warams; and the question is, as the Subordinate Judge puts it at the end of paragraph 23 of his judgment "What are the legal implications of the long possession of the archakas?" in face of the fact that the property belongs to the temple.

After stating the question for determination the learned Subordinate Judge examines a number of decisions and then at the end of paragraph 25 of his judgment states his conclusion which is that

> "From all the decisions above referred to, the only conclusion I am able to come to is that when it is established that the archakas have been in very long possession of the property, it must be presumed that they have been in possession legally and that as long as they carry out the purposes for which they were put in possession of the property they cannot be dispossessed."

Earlier, at the end of paragraph 24 he had said

> "Here, the archakas, as I said above, are in possession of the suit properties and are doing service of nitya nivedya deeparadhana, and to that extent, they must be deemed to be the trustees and the plaintiffs cannot dispossess them."

In our opinion, the authorities cited by the learned Subordinate Judge are distinguishable and do not support his conclusion. In *Kumaraswami Asari* v. *Lakshmana Goundan*[1], a pujari who founded a public temple had bought a few lands in the name of the temple and the rest in his own name. He had used part of the income for the purposes of the temple and the rest for his own benefit, and this mode of expenditure was continued during the lifetime of his son and grandson. In these circumstances it was held that usage was relevant to determine whether the lands and the offerings were after their acquisition endowed entirely for the temple or were only endowed with the actual expenses thereof. In *Kotayya* v. *Venkata Gopal Rao*[2], it was found that there had been a grant of an inam to the archakas and the question was with regard to the construction of the grant. Neither of these decisions has any application to a case like the present where the archakas are found to be in possession and claim to be entitled to remain in possession of the whole of the property which was the subject of a grant to the temple. *Magniram Sitaram Kasturbai* v. *Manibhai*[3] and *Mahammad Mosaffar Musavi* v. *Jabeda Khatun*[4], decided by the Privy Council are cases in which a lawful origin of permanent leases granted by religious institutions was presumed. The Subordinate Judge thought that on the analogy of these cases it could safely be presumed that the archakas in the present case had been in possession and enjoyment legally. In our judgment these cases also do not apply. The presumption made in them is of a lawful origin or proprietary rights long and quietly enjoyed. In the present case once it has been held that the grant was to the temple there can be no question of the archakas having acquired any proprietary rights in the lands as against the temple. Whatever the origin of their possession may have been, they must be held to have been in possession in a fiduciary capacity. On the other hand it is argued for the appellants that whenever the question has directly arisen of the claims of archakas in possession as against an institution to whom the grant of the property was made, the claims of the archakas have been disallowed. This submission seems to us to be correct. The cases relied on for the appellants are *Srinivasacharyulu* v. *Pratyanga Rao*[5], *Gopalacharyulu* v. *Lakshminarayana*[6], *Hindu Religious Endowment Board* v. *R. Veeraraghavacharyulu*[7] and *Narasimhacharyulu* v. *Subbayya*[8]. In *Srinivasacharyulu* v. *Pratyanga Rao*[5], it was stated that:

> "it would be a dangerous proposition to lay down that, if the trustees of religious trusts have, for many years, been applying the income to their own personal use, the trust deed must be construed in the light of such conduct."

59 M.L.J. 974: I.L.R. 53 Mad. ... : I.L.R. 57 Cal. 1293 (P.C.)
5. A.I.R. 1921 Mad. 467.
... Mad. 466. 6. A.I.R. 1929 Mad. 87.
... L.J. 501: I.L.R. 49 ... I.A. 54 ... (1937) 2 M.L.J. 968 ...
... P.C.) ... (1919) 18 M.L.J. ...
... 641: L.R. 57 I.A. 125.

In *Gopalacharyulu* v. *Lakshminarayana*[1], the Inam Register showed that the properties which were in possession of the archakas belonged to the temple. It was argued that the archakas must be deemed to have a right in the property according to the custom. The learned Judges who decided the case—Phillips and Odgers, JJ.—did not accept this contention. The facts in the case were very similar to those in the present case. At the time of the Inam settlement the archakas were not shown to have any rights in the property, and there had been no surplus until the lands were converted from the dry to wet. Phillips, J., in his judgment pointed out that, in these circumstances, the Archakas could not have acquired any right by custom either in the land or as regards the utilisation of the surplus receipts. In *H.R.E. Board* v. *P. Veeraraghavacharyulu*[2], where the plaintiffs, who were the archakas, claimed a prescriptive title in the properties, Varadachariar, J., observed that:

"The plaintiff's claim of prescriptive title is equally untenable. They and their predecessors in title have been all along archakas in charge of the existing temple and there have been no other trustees; the result is that if the Inams could otherwise be regarded as belonging to this temple, it is not open to them to plead that their possession was adverse to the temple."

Narasimhacharyulu v. *Subbayya*[3], was a case in which the grant was to the temple but the archakas maintained that the income from the lands of which they were in possession should be applied only to the limited purpose of the performance of the archaka's duties. The view taken by the Subordinate Judge that:

"there is no usage proved or recognisable in law as regards the application of the income to this limited purpose only"

was approved by Coutts Trotter and Srinivasa Ayyangar, JJ.

It is argued by learned Counsel for the defendants that the question is not so much whether the archakas can obtain title by adverse possession as against the temple, as whether they have obtained a right to be remunerated in a certain way from the endowments of the temple; and in support of the proposition that archakas can obtain such a right which Courts will not be justified in setting aside he has referred us to the case of *Sri Mahant* v. *Govindacharyulu*[4], decided by Varadachariar and Burn, JJ. In that case, although the offerings and collections were dedicated to the temple, it was held that an arrangement by which archakas are remunerated by a share in the offerings and collections cannot be regarded as being an alienation of trust property and that when such an arrangement has been in vogue for a long time and sanctioned by usage, Courts will not be justified in setting it aside. In our opinion this decision applies to the particular facts of the case and cannot be extended to cases where the archakas claim a right to remain in possession of properties in respect of which the grant was to the temple. Moreover in *Sri Mahant* v. *Govindacharlu*[4], the decision was based on the fact that the arrangement had been in vogue for more than one hundred years and that it was an arrangement of a kind well known in this country. In the present case the archakas do not seem to have put forward any claim to the properties in 1860. The archakas are no doubt entitled to remuneration, for their services but as the properties belong to the temple, they are not entitled to appropriate for themselves any surplus there may be after the expenses of the particular services which they render have been met. In short, as they have no title to the land or to the surplus income, the question whether they should in fact be left in possession of the properties is an administrative matter, mainly dependent no doubt on the extent of the income derived from the land, and is not a question for judicial decision.

It is also argued that the present case is distinguishable from the cases cited because in the present case there was a trustee of the temple even at the time of the Inam settlement and because the archakas are not in possession of the whole but only of part of the properties dedicated to the temple. We do not think that either of the distinctions sought to be drawn affects the application of the authorities.

1. A.I.R. 1929 Mad. 87.
2. (1937) 2 M.L.J. 368.
3. (1916) 31 M.L.J. 202.
4. (1934) 68 M.L.J. 295.

to this case. There is no evidence as to how the archakas came into possession of the properties or why they were in possession. But if the trustee allowed the archakas to renumerate themselves from the surplus income of the lands when their value was small and considered that they should be remunerated in some other way when the value increased by reason of their conversion from dry to wet, he would have been acting reasonably and within his rights. If, on the other hand, the archakas were in possession merely owing to his negligence, his negligence cannot affect the rights of the institution. It is true that the temple does own other properties, but there was a separate grant of the properties now in question and the archakas are in possession of the whole of them. We do not think that any inference can be drawn of a usage which should be recognised that the archakas are entitled to be remunerated from the whole of the surplus income of these lands merely because the temple owns other lands.

An issue was framed, the 10th, as to whether the suit was barred by limitation; and the learned Subordinate Judge somewhat surprisingly, has found the issue in the affirmative. The ground on which the finding is based is that the plaintiffs had not shown that the temple was ever in possession of the property within twelve years before suit. If the case was between the temple and a third party it might be that the plaintiffs would have to show that the temple had been in possession within twelve years of the suit. Once, however, it is held that the property belonged to the temple there can be no question of adverse possession as between the temple and the archakas. The archakas were in possession of the property in a fiduciary capacity and cannot have prescribed for it. There was, therefore, no bar of limitation.

As regards the B schedule properties, which consist of buildings admittedly within the temple compound, the learned Subordinate Judge found that the archakas were not entitled to the properties, except a right of residence in plot X so long as they do service. Against this finding, defendants 1 and 2 have filed a memorandum of cross-objections. It is not seriously disputed that the buildings and sites belong to the temple; and, that being so, the trustees are entitled to eject them from plots Y and Z. Whether the archakas should be given any other place in which to live than plot X is a domestic matter between them and the trustee.

For the reasons given, therefore, the appeal is allowed with costs throughout. In the circumstances of the case, the costs will be recovered from the properties belonging to the temple. The memorandum of cross-objections filed by defendants 1 and 2 is dismissed with costs. The unsuccessful cross-appellants will pay these costs.

V.S. — *Appeal allowed.*
Cross-objections dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE GOVINDARAJACHARI.

Kammela Somasundaramma .. *Appellant**

v.

Kammela Seshagiri Rao *alias* Professor Giri Rao and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 17, rules 2 and 3—Refusal of adjournment and reporting of no instructions by plaintiff's pleader—Decision purporting to be based on finding on merits dismissing the suit as not maintainable—Dismissal of application by plaintiff to restore suit under Order 9, rule 9—Appeals against dismissal of application under Order 9, rule 9, as well as against decree dismissing suit on merits—Failure of former appeal—If bars latter appeal.

Where on the refusal of an application for adjournment the plaintiff's pleader reports "no instructions" and the plaintiff though present during the defendant's arguments asks for time to engage another pleader which is refused, the trial judge should, in such circumstances, pass an order dis-

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*Appeal No. 487 of 1945. 6th February, 1947.

missing the suit for default and not purport to pass a decree based on a finding on the merits against the plaintiff. Where in such circumstances a decree purports to be passed on the merits the plaintiff will not be deprived of the remedy of applying under order 9, rule 9, for the restoration of the suit on the ground that it has really been dismissed for default. But the fact that this remedy has been recognised will not deprive the plaintiff of the remedy which the law allows to a plaintiff against whom a decree has been passed dismissing the suit on the merits. Merely because the decree on merits can for certain purposes be treated as the order which ought to have been passed (namely, dismissal for deafult) it does not follow that for the purposes of disposal of appeal the Court is not to have regard to the decree which was in fact passed. The failure of an appeal against the dismissal of an application for restoration of the suit dismissed for default is no bar to an appeal against the decree treating it as a decree on the merits.

Appeal against the decree of the Court of the Subordinate Judge, Masulipatam in O.S. No. 65 of 1944.

P. Satyanarayana Rao and *C. V. Narasimha Rao* for Appellant..

The Advocate-General (*K. Rajah Aiyar*) and *D. Narasaraju* for Respondents.

The Judgment of the Court was delivered by

WADSWORTH, J.—This appeal arises out of a judgment which purports to dismiss the appellant's suit on a preliminary issue. An objection was raised to the maintainability of the appeal based on the contention that the decision must really be regarded as one of dismissal for default under Order XVII rule 2 of the Code of Civil Procedure, and that in such circumstances the only remedy is by way of an application under Order IX, rule 9 to set aside the dismissal, and that such an application having been made in this case and having been rejected, no appeal against the decree in the suit can lie.

The plaintiff appellant filed the suit against her two brothers praying that the first defendant be directed to deliver to the plaintiff certain moveable properties or pay the value thereof. The suit was filed in the Court of the Subordinate Judge of Bezwada and was transferred to the Court of the Subordinate Judge of Masulipatam. In the latter Court the contention was taken by the first defendant that issue No. 2 which is "whether the allegations in the plaint disclose any cause of action entitling the plaintiff to sue as heir to late Lakshmikantamma" should be tried as a preliminary issue. The suit was posted for arguments on this issue and was adjourned to the 4th April, 1944, on which date the plaintiff filed a petition to amend the plaint so as to clarify her case. This petition involved a series of stay orders, since the amendment was refused and the matter was taken up on revision to the High Court, the revision petition being finally dismissed. The matter came up for arguments again on issue No. 2 on the 14th February, 1945, when at the request of the plaintiff's pleader it was adjourned to the 19th February. On that date a further adjournment was refused and the plaintiff's lawyer reported no instructions and withdrew. The plaintiff who was present in Court was asked if she was prepared to reply to arguments on the second issue. She said that she wanted to engage another pleader. The arguments on behalf of the first defendant were then heard, and while these arguments were proceeding the plaintiff left the Court and her absence was recorded. The learned Subordinate Judge however did not proceed to dismiss the suit for default. He heard the arguments out and then gave a considered finding on issue No. 2 to the effect that the plaintiff had no cause of action to maintain the suit on her own admissions as contained in paragraphs 3 and 4 of the plaint. In view of this finding a further trial of the issues was held to be unnecessary and the suit was dismissed. This decision purports to be a decision on the merits. Nevertheless the plaintiff tried to get the suit restored to file by means of an application under Order IX, rule 9, which was dismissed. She filed a Civil Miscellaneous Appeal against the dismissal of that application and at the the same time filed the present appeal against the decree treating it as a decree on the merits. The Civil Miscellaneous Appeal failed.

It is argued for the respondents that on the authorities it must be taken that, when the plaintiff is absent, even if the Court purports to decide the suit on the merits and dismisses it, the decision must be regarded as a dismissal for default,

the remedy against which is an application under Order IX, rule 9 and that if the decision is really to be regarded as dismissal for default, there can be no question of an appeal against the decision as a decision on the merits. We are not concerned here with the class of cases where the Court decides the suit in circumstances which justify the conclusion that the plaintiff though physically present, was not actually appearing for the purpose of conducting the case. Here the plaintiff was physically absent during the later portions of the arguments of the first defendant's lawyer and at the time when the case was closed. We may take it that the learned Subordinate Judge should in such circumstances have passed an order dismissing the suit for default, and that when he did not do so, but purported to pass a decree based on a finding on the merits against the plaintiff, the plaintiff will not on the reasoning of the Full Bench in *Pichamma* v. *Sreeramulu*[1], be deprived of the remedy of applying under Order IX, rule 9, for the restoration of the suit on the ground that it has really been dismissed for default. But does this mean that, because the plaintiff has the right to ask for the relief which would have been available had the Court passed an order under the correct provision of law, the plaintiff has lost the right which the law gives for appealing against an adverse decree on the merits?

No direct authority has been quoted before us either for or against the appellant on this point. It has, however, been argued by Mr. Satyanarayana Rao for the appellant that the analogy of cases like *Latchamanan Chetti* v. *Ramanathan Chetti*[2], and *Muthiah Chettiar* v. *Govinddas Krishnadas*[3], should be applied. Here the Subordinate Judge wrongly in the absence of the plaintiff, proceeded to go into the merits of the preliminary issue and on the adverse finding on that preliminary issue passed the decree dismissing the suit. No doubt, the judgment refers to circumstances which would have justified the dismissal of the suit for default, but the learned Judge does not purport to dismiss the suit for default. He purports to dismiss it because he does not agree with the contention of the plaintiff and does agree with the contention of the first defendant on the preliminary issue. It was held in *Muthiah Chettiar* v. *Govinddas Krishnadas*[3], following a considerable line of authority that when the Court wrongly acts under an appealable provision of law and passes an order which, having regard to the provision of law under which it is passed, is appealable, an appeal will lie even though the order should have been passed under a provision of law which would not carry with it a right of appeal. We find it difficult to differentiate between such a case and the present case. The Subordinate Judge wrongly passed a decree on a finding on the merits adverse to the plaintiff who was absent. No doubt it is recognised that the plaintiff can get the suit restored on showing that she was absent for good reason, but the fact that this remedy has been recognised, surely should not deprive her of the remedy which the law allows to a plaintiff against whom a decree has been passed dismissing the suit on the merits. Merely because this decree can for certain purposes be treated as the order which ought to have been passed, it does not seem to follow that for the purpose of appeal we are not to have regard to the decree which was in fact passed. In this view we are of opinion that the appeal lies.

Turning to the merits of the appeal the decision of the preliminary issue depends upon the view which is taken of the pleadings. The plaintiff describes herself as the daughter of her mother Audilakshmamma and as belonging to the Kalavanthula caste. She describes her brothers also as being sons of Audilakshmamma with no reference to their father, but as being of Telaga caste. In the body of the plaint it is recited that the plaintiff and her two sisters remained unmarried and were earning their livelihood by prostitution, and that defendants 1 and 2 married women of caste and followed independent professions and had no relationship with their prostitute sisters. Then it goes on to assert that Lakshmikantamma had amassed wealth in the profession of a prostitute and had died intestate and that the plaintiff being her only surviving childless prostitute sister was the sole person entitled to succeed to Lakshmikantamma's estate, and it goes on to assert

1. (1917) 34 M.L.J. 24 : I.L.R. 41 Mad. 268 (F.B.).
2. (1904) 14 M.L.J. 436 : I.L.R. 28 Mad. 127.
3. (1921) 41 M.L.J. 316 : I.L.R. 44 Mad. 919 (F.B.).

that the defendants falsely claiming to be the heirs of Lakshmikantamma had been attempting to divide the property. The written statement of the first defendant begins by asserting that the description of the plaintiff as of Kalavanthula caste is invented for the purpose of the suit and that she, the defendants, their deceased sisters and their ancestors belong to the Telaga caste and are governed by the ordinary law. He also denied the allegation that the plaintiff and her deceased sisters were living by prostitution. When issues were framed, objection appears to have been taken which led to the framing of issue No. 2 extracted in the beginning of the judgment. The objection seems to have been that the plaintiff had not set forth any special custom whereby she was entitled to succeed to her deceased sister and that the theory that prostitution severs the tie of kinship between a woman and her blood relations is no longer good law. The plaintiff sought to meet this contention by praying for the amendment of her plaint by including a plea that "she belonged to Kalavanthula *alias* dancing girl caste and according to the custom prevailing in that community she was entitled to succeed." This amendment was opposed on the ground that it was changing the nature of the suit and the trial Court rejected the application. In revision Byers, J., held that "all the facts necessary regarding the status and profession of the deceased have already been included in the plaint and the refusal to allow the amendment is no error of jurisdiction." This learned Judge seems to have been of the opinion that the plaint as it stood forms sufficient basis for the case which the plaintiff proposed to put forward. The learned Subordinate Judge, however, in dealing with this issue has placed great emphasis on the fact that the plaintiff described her brothers as Telagas by caste and has assumed that she was admitting that she and her sisters were also Telagas who had fallen into prostitution and was basing her claim solely on the theory that the degraded women succeed, one to the other, and were no longer bound by relationship to their undegraded kindred.

It seems to us that the learned Subordinate Judge has been at pains to force the plaintiff into a legal position which she never intended to take up. Seeing that the plaintiff starts by describing herself as of the Kalavanthula caste (which is admittedly a caste of dancing girls) as the daughter of her mother and not of her father, and goes on to assert that she and her sisters were practising prostitution while the brothers had married women of caste and were living by independent profession, it is clear that the intention of the plaintiff was to allege that the caste to which she and her sisters belonged was the dancing girl caste, that they followed the dancing girls' profession and that the brothers by marrying women of respectable communities had gone out of the caste in which they were born. If that is so, the description of the brothers as Telagas would be no more than a recognition of the description which the brothers would apply to themselves. It is suggested that the practice of the male members of the dancing girl community who marry and live respectable lives is to describe themselves as belonging to a caste other than the one in which they were born. The plaintiff by describing her brothers as Telagas seems merely to have used the description by which they would not ordinarily be known. We do not find any clear indication in the plaint that the plaintiff was proposing to rely on the obsolete rule regarding succession to the estate of the degraded women. That the plaint was not misunderstood by the first defendant is clear from his written statement in which he denies the assertion that the plaintiff and her sisters belong to the Kalavanthula caste or are prostitutes. He tries to make out that the plaintiff is a Telaga by caste in order to show that the special rules relating to the succession to women of the Kalavanthula caste would not apply to them. No doubt the plaintiff might have made her plaint more clear and it seems to us regrettable that her attempt to clarify her pleadings by way of amendment was opposed and rejected; but we do not read the plaint as putting forward the case which the learned Subordinate Judge has deduced from it. The question whether the plaintiff and her sisters are in fact members of the dancing girl community and the question of the precise character of the customary law which will govern them are matters for evidence; but on the plaint read as,

we think, it was intended to read, we are of the opinion that the decision of the learned Subordinate Judge on the second issue was wrong.

In the result, therefore, we allow the appeal and remand the suit to the lower Court for disposal according to law after recording such evidence as the parties may adduce. The respondents will pay costs in the appeal. The costs in the suit will abide the result. Court-fee on the memorandum of appeal will be refunded.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Guttula Masenu and others .. *Appellants**

v.

Madimpalli Bhavaraju Garu and another .. *Respondents.*

Madras Estates Land Act (I of 1908 as amended), section 3 (15), Explanation—Scope—Lessee from pre-existing ryot—Whether entitled to occupancy right under Amending Act.

The purport of the explanation introduced in section 3 (15) of the Madras Estates Land Act by the Amending Act of 1934 is to give occupancy rights to a person who was able to prove occupation for twelve years where there was no other ryot already having occupancy rights in the land. It is not meant to affect the relationship between the ryot and his lessee, so as to confer occupancy rights on some other person who was not until then a ryot at all.

Appeals against the decrees of the Court of the Subordinate Judge of Amalapuram in A.S. Nos. 132 and 151 of 1944 respectively preferred against the decrees of the Court of the District Munsiff of Amalapuram in O.S. Nos. 99 of 1944 and 224 of 1943 respectively.

C. Rama Rao for Appellants.

P. Somasundaram and *P. Satyanarayana Rao* for Respondents.

The Court delivered the following

JUDGMENT :—The appellants were defendants in O.S. No. 224 of 1943 and O.S. No. 99 of 1944, the plaintiffs being persons who claimed to have occupancy rights in the lands in dispute. The case of the appellants was that the plaintiffs were really landholders and that since the defendants were in possession at the time when the Madras Estates Land Act was amended they acquired occupancy rights.

There can be no doubt that the plaintiffs were in possession of the lands for a very long time, long prior to 1908, when the original Act came into force. On the 11th November, 1887, two documents came into existence, one Ex. P-19, purporting to be a grant by the proprietors of a certain village, and the other, Ex. P-1, an ordinary lease granting leasehold rights to grantees from the expiration of that agreement, the 1st of April, 1908. The lower Courts have found that the defendants have not acquired occupancy rights, and that the plaintiffs were in possession of the lands in dispute even prior to the defendants' occupation. The very many documents filed in the case and the evidence of persons who had long knowledge of these lands, including P.W. 1 and P.W. 3, the latter being the karnam of the village from 1892 to 1909, show that the plaintiffs were in possession of about 15 acres of cultivable lands even prior to 1908. Mr. Bhimasankaram contends on behalf of the appellant that it does not suffice for the plaintiffs to show that they had been in possession before the defendants were, but they had to prove that they were in possession as ryots. That is no doubt true; but Exs. P-1 and P-19, together with the other documentary evidence in the case, leads one to that conclusion, in the absence of any evidence of any other person having been in possession as a ryot.

It has been argued that the learned Subordinate Judge should have had regard to kadapas earlier than the suit kadapas and seen that the proper rent was

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* S.A. Nos. 1951 and 1952 of 1945. 25th February, 1947.

a cash rent very much smaller than that now claimed. As, however, the learned Subordinate Judge found that the suit kadapas were not brought about by fraud or misrepresentation, but were binding on the defendants, there can be no question of the appellants having to pay any rent in cash. What exactly they have to pay as rent has been left to be ascertained by separate proceedings.

It has been argued as a point of law that the 1934 amendment to section 3 (15) of the Madras Estates Land Act by adding an explanation that any person in actual occupation of the land for 12 years shall be deemed to be a ryot, has the effect of giving occupancy rights to whomsoever may be actually cultivating the land. The explanation of the clause must however be read with the clause itself, and so we cannot ignore the fact that in the definition of ryot in sub-section (15) of section 3, it is necessary that the person claiming to be a ryot should not only be cultivating the ryoti land, but should be doing so on condition of paying to the landholder the rent which is legally due upon it. To read the explanation as if it were an independent section would be to nullify an important ingredient of the definition of a ryot. Moreover, one cannot construe the statute so as to take away the occupancy right of a ryot without express words to that effect. It could not have been the intention of the Legislature by this amendment to deprive persons who were formerly ryots of their status as ryots by giving occupancy rights to some other person who was not until then a ryot at all. The purport of this amendment was to give occupancy rights to a person who was able to prove occupation for 12 years where there was no other ryot already having occupancy rights in the land. Section 19 of the Act also shows that this explanation was not meant to affect the relationship between the ryot and his lessee; for that section says:

"Except as otherwise specially provided in this Act, the relations between a ryot and his tenants or between a landholder and a tenant of his private land, and the rights of any other owners of land, are not regulated by the provisions of this Act."

For the reasons above given, the contention cannot be accepted that the Legislature intended by that explanation to deprive ryots of their occupancy rights in order to give them to others.

The appeals are dismissed with costs, Advocate's fee (one set).

B.V.V. *Appeals dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

J. Kuppuswami Chetty .. *Appellant**

v.

B. V. Anantharamier and another .. *Respondents.*

Arbitration—Award—Three named arbitrators—Conclusions communicated to parties by letter—Letter signed only by two arbitrators—Validity of award.

Arbitration Act (X of 1940), *S.* 33*—Application for declaration that there was no valid award—Filing of award—Necessity.*

Where the arbitration agreement referred the matters in dispute to three named arbitrators and one of them withdrew after a partial disposal of the business which all were called upon to carry out, and the remaining two arbitrators completed the disposal of the remaining business and then intimated their conclusion to the parties by a letter,

Held, that the letter whereby the two arbitrators intimated their conclusion did not constitute an award.

Held, further, that since the letter incorporating the conclusions of the arbitrators was signed only by two out of the three arbitrators it was not a valid award.

When an application is presented to the Court under S. 33 of the Arbitration Act, which challenges the existence of an award, no award need, or can, be filed in such an application.

On appeal from the judgment and order of Clark, J., dated 29th March, 1946, in the exercise of the ordinary original civil jurisdiction of the High Court in O.P. No. 46 of 1946.

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* O.S.A. No. 22 of 1946. 10th February, 1947.

T. C. A. Bashyam and *K. Balaram Naidu* for Appellant.

M. K. Harihara Aiyar for Respondents.

The Court delivered the following

JUDGMENTS : *The Chief Justice.*—The appellant and the two respondents formerly carried on a business in partnership under the name of Bhagyalakshmi & Co. Disputes arose between them which were referred to the arbitration of three named arbitrators by an agreement in writing between the parties, dated 4th January, 1945. The agreement, *inter alia* provides that (1) in case P. Govindasawmi Chetti (one of the arbitrators) declined to act, the appellant should be at liberty to nominate another arbitrator in his place ; (2) in case two of the arbitrators declined to act, the whole arbitration should come to an end and the parties be relegated to their prior rights ; a decision of the majority of the arbitrators should be the decision which must prevail in all matters connected with the arbitration ; (3) the arbitration should be completed within one month from the date of the agreement subject to an extension of time, not exceeding six weeks thereafter, being taken if all the three arbitrators passed a resolution to that effect.

No resolution was passed by the three arbitrators extending the time during which they could conclude the arbitration and make their award. The one month's period expired on February 4th, 1945, by which date no award had been made. Subsequently the three arbitrators examined the partnership accounts. This examination was completed by February the 27th. Thereafter P. Govindaswami Chetti declined to act further as an arbitrator, but the appellant did not appoint another arbitrator in his place pursuant to his power or right to do so given by the agreement.

Later, on 15th March, 1945, the remaining two arbitrators addressed a communication, which later was called a letter, to the first respondent and to the appellant. None of the parties requested the signatory arbitrators to file this document in Court and no other steps were taken in that behalf and it has not been filed in Court as an award as provided in the Arbitration Act.

The document states that the two signatory arbitrators give " the following decision ". It recites that a copy of the account ascertained by the three arbitrators, dated 27th February, 1945, had been given to the first respondent (who acted on his own behalf and on that of the second respondent) and an unsigned copy to the appellant ; thereafter Govindaswami Chetti did not associate with the other two arbitrators in further proceedings ; the document then states that the other two arbitrators " decide the following matters mentioned herein finally in accordance with our joint opinion." Then follows their conclusions regarding the subject of their arbitration.

On 23rd April, 1945, the same two arbitrators wrote to the respondents that they had ascertained that their letter, dated 15th March, addressed to the respondents as well as to the appellant was served upon him (the appellant) also, through post several days back and he had not chosen to send a reply or to use the arbitrators in that connection and they refused to act as arbitrators for such people ; the letter concludes that they would do nothing more in the arbitration matter and the respondents were at liberty to take such proceedings in Court as they liked ; the arbitrators declined to act.

On 25th May, 1945, the respondents instituted against the appellant a suit claiming dissolution of the partnership and the customary consequential relief in a suit of that nature. In his written statement the appellant pleaded that the respondents had induced him to consent to the arbitration and had procured an award which would be rejected by the Court on the face of it as illegal and invalid, and further that the respondents had lost their right to institute the suit, which was barred, by reason of the arbitration ending in an award.

On 25th February, 1946, the respondents made an application under section 33 of the Arbitration Act to the Court for a declaration that there is no valid award

in existence and no subsisting arbitration agreement. In his affidavit in reply the appellant states that the period of one month prescribed in the arbitration agreement for an award to be made was extended as provided therein and the majority of the arbitrators gave their decision on 15th March, 1945 and he denies that no valid award is in existence. He asserts that its validity cannot be questioned by proceedings under section 33 of the Act and alleges that the proceedings are defective on account of the absence of the award being filed with the petitioner. Clearly the appellant has asserted that the document, dated 15th March, 1945, is an award under the Arbitration Act.

The application came before Clark, J. At the hearing before him the document, dated March 15th, was placed before the Court and the learned Judge held that it was not an award and rejected the appellant's contention, that he had no jurisdiction to entertain its validity or otherwise on the ground that it had not been filed in Court. This is the appellant's appeal against the learned Judge's decision.

In my opinion, the learned Judge was perfectly correct in the conclusion to which he arrived.

Firstly, if the document dated March 15th, 1945, is an award, it was made more than one month after the date of the arbitration agreement and after the period which the agreement prescribes for the award to be made. There was no resolution by the arbitrators pursuant to the provision in the agreement by which they, apparently, were authorised to extend the time by six weeks, making ten weeks in all from January the 4th; that circumstance alone vitiates the award and makes it a nullity. Assuming, however, that such a resolution, which the arbitration agreement prescribes, was passed, nevertheless, the award is not one which has any validity or legality. Section 28 (2) of the Arbitration Act enacts that any provision in an arbitration agreement, whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect. There was no agreement by all the parties for the arbitrators to extend the time by passing the resolution envisaged in the arbitration agreement. Consequently, the time could not be legally enlarged and the period during which the arbitrators could make an award expired about six weeks before the document of March the 15th came into existence. Even if that document is an award it is one which has no validity and is not, in law, an award.

Secondly, the document of March 15th, in my view was never intended to be, and never in fact was, an award. It sets out what is expressed to be a decision of two out of three arbitrators on the conclusions to which they had arrived. The original was sent to the respondents and a copy, apparently, was forwarded to the appellant, but he refused to accept the document or the envelope in which it was contained. Arbitrators do not send to one party the original award and to another party a copy. They intimate to both parties that their award has been made. It is then for the parties, pursuant to section 14 of the Arbitration Act, to request the award to be filed or the Court directs that course to be taken. Looking at the document, in my view, it was merely nothing more than the parties being notified the conclusions to which the two remaining arbitrators had arrived and it was not intended to be the award formally required by them under the Act. This view is confirmed and supported by the letter which the arbitrators wrote to the respondents alone on the April 23rd, 1945, to which reference has previously been made.

Thirdly, the arbitration agreement referred the matters in dispute to three named arbitrators. One of them withdrew after a partial disposal of the business which all would be called upon to carry out. The remaining two arbitrators completed the disposal of the remaining business and then wrote their letter dated March the 15th. The subject-matter of the arbitration did not receive the united attention of all the arbitrators. Whilst the agreement provides that the decision of the majority of the arbitrators shall prevail, nevertheless, the law requires, and

it is well established, that all the arbitrators must give their united consideration to all matters arising in the arbitration which has been referred to them. This well-established principle of law is discussed and explained in *Patel Bros.* v. *Shree Meenakshi Mills, Ltd.*[1], by Chagla, J., at page 565 of the report. The learned Judge's view and conclusion were upheld by an appellate Bench of the Bombay High Court a report of which is included after the judgment of Chagla, J. In that case the Court of first instance and the appellate Court each held that an award was a nullity when one of nine arbitrators himself absented after proceedings in arbitration commenced and before the conclusion. The decision of the appellate Bench of the Bombay High Court proceeded to the Judicial Committee and the judgment of their Lordships of the Privy Council is to be found under the name of *Shree Meenakshi Mills, Ltd.* v. *Patel Bros.*[2] When the matter reached the Judicial Committee, it was assumed that the award of the 8 of 9 arbitrators was a nullity and the question was not argued and no judgment was given with regard to whether it was a nullity or not. But, at pages 473 and 474, the Board observed as follows :

"Should the same question arise for decision hereafter it will be necessary to consider whether the well-established principle that, in the case of a reference to two or more named arbitrators, all the arbitrators must act together, can properly be applied when the reference is not to individuals but to a body, such as a committee or a Board, whose corporate powers are regulated by its constitution."

From the observations of the Judicial Committee it would seem that the well-established principle was not one which could be disputed. The only question which might arise was whether that principle could be extended to arbitrators not named personally but as members of the same body. With respect I agree with the judgments given by the learned Judge of first instance and the appellate Bench of Bombay. In my opinion, since the document of May the 15th, 1945, was a decision, which it purports to be, arrived at after a consideration of the whole matter by two and not by all the arbitrators to whom the matters in dispute had been referred, even if that document otherwise might have been an award, since the three arbitrators did not together consider the matters in arbitration throughout, the award by two of them is not one which can stand, in spite of the provision in the arbitration agreement in this case that the majority view should prevail.

Fourthly, the argument that the application before Clark, J., was defective because no award was filed with the application is based upon the contention with reference to section 14 of the Arbitration Act. That section requires the award to be signed and to be filed in Court by the arbitrators at the request of the parties or at the direction of the Court. Section 15 empowers the Court to modify an award, section 16 to remit the award back to the arbitrators, and section 17 to pass judgment in terms of the award ; and section 30 specifies the grounds upon which an award can be set aside. The sections to which reference has been made, in my view, have to be read together. It is quite clear, and there is no need to refer to the decisions of the several High Courts in this country, as well as in England, that the Court cannot pass judgment upon an award or set it aside or remit it back to be modified by the arbitrators unless the award has been filed in Court. The application before Clark, J., was under section 33 of the Act which enables an application to be made challenging the very existence of an award. If no award has ever existed, how can it be said that the award must be filed in Court ? It is difficult to follow the argument of learned counsel for the apellant who strenuously and repeatedly maintained that no application lies under section 33 unless the applicant files with his application the award which has been made. In my opinion, when an application to the Court is presented which challenges the existence of an award, no award need, or can, be filed in such an application. At the hearing before Clark, J., the document of March the 15th was produced, but that was to enable him to examine it and to arrive at a conclusion whether it was an award or not. Since it was not an award, clearly it was not required to be filed when the petition was presented in which the application was made.

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1. I.L.R. 1942 Bom. 558. 2. I.L.R. 1944 Bom. 469.

In my opinion, for reasons given above, this appeal must be dismissed with costs.

Rajamannar, J.—I agree.

B.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Yendamuri Veeranna .. *Appellant**

v.

Yendamuri Satyam and others .. *Respondents.*

Hindu Law—Succession—Dancing girl community—Daughter's son if has a preferential right to maternal grandfather's property as against daughters' daughters.

A person belonging to the dancing girl community, died leaving his widow, to whom he was lawfully married and his two daughters by her. Both these daughters led the ordinary life of women of their community and had children whose paternity was unknown. On the death of the widow and the two daughters, a daughter's son claimed to be entitled to succeed to his maternal grandfather as daughter's son as against the daughters' daughters.

Held, when under the Hindu Law a daughter or a son is referred to the law-givers have contemplated only a legitimate son or a legitimate daughter. Illegitimate children have no rights at all in succession except in the two specified special classes of cases. Hence an illegitimate son of a daughter cannot be considered under the Hindu Law as the daughter's son and would not be entitled to the rights and privileges of a daughter's son.

Viswanatha Mudali v. *Doraiswami Mudali*, (1925) 49 M.L.J. 684 : I.L.R. 48 Mad. 944 at 959, followed.

Appeal against the decree of the District Court, East Godavari, at Rajahmundry, in A.S. No. 135 of 1943 preferred against the decree of the Court of the Subordinate Judge, Rajahmundry, in O.S. No. 28 of 1941.

V. Viyyanna for Appellant.

V. Govindarajachari and *T. V. R. Tatachari* for Respondents.

The Court delivered the following

JUDGMENT.—One Sattappa, a member of the dancing girl community, died in 1896 leaving his widow Paddamma, to whom he was lawfully married, and two daughters Pedda Satyabhama, who died in 1907, and Chinna Satyabhama, who died in 1938. Both these daughters led the ordinary life of women of their community and had children whose paternity is unknown. Pedda Satyabhama had only one daughter, who was impleaded as the first defendant. Defendants 2, 4 and 5 are her offspring by promiscuous unions. Third defendant is the son of second defendant. The plaintiff is the only son of Chinna Satyabhama and defendants 6, 7 and 9 are the daughters of Chinna Satyabhama by promiscuous unions. The eighth defendant is the daughter of the seventh defendant. The plaintiff claims the property of his grandfather, Sattappa, as his daughter's son, who has a preferential right to his grandfather's property in preference to any of the defendants, who rank only as daughter's daughters or persons of more remote decree. Both the Courts below held that since the plaintiff was not a legitimate son of Chinna Satyabhama, he cannot be considered under the Hindu Law as the daughter's son, and that he is therefore not entitled to the right and privileges of a daughter's son.

It is admitted by both sides that the rights of parties are governed by Hindu Law, subject of course to any agreement that they may have entered into amongst themselves. The main question arising in this litigation is whether, if it were held that the plaintiff ranked as a daughter's son, he would have higher rights than a daughter's daughter. In the absence of authorities to the contrary, I have no doubt that when under the Hindu Law a daughter or a son is referred to, the law-

*S.A. No. 1276 of 1945 (*in forma pauperis*). 23rd July, 1946.

givers have contemplated only a legitimate son or a legitimate daughter. Illegitimate children have no rights at all in succession except in two classes of cases—as far as I have seen from the authorities cited before me. One exception to the general rule that illegitimate children have no rights is the case of the illegitimate sons of a Sudra. That exception is based on a special text and the interpretation of that text has led to an extension of the rule, which enables the legitimate descendants of one of two illegitimate sons of a Sudra to inherit from the legitimate descendants of another illegitimate son of the same father. The second exception is that the illegitimate children of a common mother can inherit from one another and from their mother and their legitimate descendants can inherit from one another.

Although there is no direct authority in support of the plaintiff's claim, yet his learned advocate has referred to the reasoning of learned Judges in certain cases as indicating that in order to determine whether one person can inherit from another, the test is sapinda relationship or propinquity; but as has been pointed out earlier that what the Hindu Law givers understood by sapinda relationship and propinquity refers only to inheritance through legitimate children. The case most favourable to the appellant is *Narayana Pundlik Valanji* v. *Laxman Daji Sirsekar*[1], where the question that had to be considered was whether a sister could inherit from another sister who lived the life of a prostitute. The learned Judge responsible for the leading judgment reasoned from various texts and held that on account of the blood relationship between the sisters, the one could inherit from the other. This particular case however is of the second class of exceptions referred to by me earlier. Jwala Prasad, J., in *Ram Pargash Singh* v. *Mst. Dehan Bibi*[2], was considering the law relating to inheritance in members of a dancing girl family; but the main question with which he concerned himself was whether the law to be applied to the parties was Hindu Law. He held that it was. In that case there were two males of the dancing girl community related as uncle and nephew. The uncle had two legitimate daughters who led loose lives; and one of them had a son who was a party to the proceedings. The two daughters, during the lifetime of their mother, mortgaged the property to a stranger, the plaintiff in that suit, and whose title therefore depended on the right of the daughters to mortgage the property to him. The learned Judge, after holding that the Hindu Law must be applied to the parties, held that the uncle and the nephew were joint and that upon the uncle's death, the property passed to the nephew by survivorship; so that the daughters, and *a fortiori* the plaintiff, had no right whatsoever. He then pointed out that even though the uncle and the nephew had not been joint, the daughters would still not have had any right to the property, because at the time when they made the alienation in favour of the plaintiff, their mother was still alive. Finally, the learned Judge said that if the uncle and the nephew had not been joint and if the mother had not been alive when the daughters made the alienation,

"she (one of the daughters) had, if any, a limited interest which she could relinquish in favour of the next reversioner, her son."

The learned advocate relies on this sentence as indicating that the learned Judge held that the son of the daughter by a casual connection was entitled to inherit from her. At best, this sentence is in the nature of an *obiter dictum*; and its value is further lessened by the circumstance that the daughter executed a document in favour of her son. The sentence above quoted is followed by this sentence:

"She did renounce her inchoate right, if any, by letting her son take the property and had his name registered in the land registration department."

The right of the son of the daughter was not discussed at all in the judgment by the learned Judge; and so the sentence quoted above is of very little value for the plaintiff.

I very respectfully agree with the remarks of Wallace, J., in *Viswanatha Mudali* v. *Doraiswami Mudali*[3], where the learned Judges had to consider whether the legitimate descendants of one illegitimate son of a dancing girl could inherit from

1. (1927) I.L.R. 51 Bom. 784.
2. (1923) I.L.R. 3 Pat. 152.
3. (1925) 49 M.L.J. 684: I.L.R. 48 Mad. 944.

the legitimate descendants of another illegitimate son of the same dancing girl. At page 959, Wallace, J., said :

"I do not think that the *placita* from various ancient texts really assist this case, because they are not, in my opinion, dealing with the rights of succession of inheritance in favour of *illegitimate* children at all, except in the case of the illegitimate son of a Sudra ; that is, in these texts 'son' means a legitimate son and 'daughter' means a legitimate daughter . . . . Illegitimate children have no place in Hindu Law . . . . . The rule laid down in *Mayna Bai* v. *Uttaram*[1] that the children of a prostitute, when the contest is purely between themselves, succeed to the property of their mother and to one another is, I think, the rule to be followed in this case. As I read that case, the prin- ciple did not in slightest degree depend either on the facts that the father was known or on the fact that the father of both illegitimate sons was the same person. It rested not on the common paternity, but on the common maternity of illegitimate sons . . . . .

Later on, the learned Judge said :

"I think the net result of the authorities and the case-law is this, that Hindu Law texts have no application to illegitimate children except in the case of the illegitimate son of a known Sudra father, that so far as the Hindu Law cannon goes, illegitimate children have no right of succession to either parent, but that the general principles of Hindu Law will be applied to such a case unless such appli- cation would violate equity and good conscience and that applying these, the Courts will hold that illegitimate children *inter se*, when there is no contest between them and legitimate children inherit to their mother and to one another."

It is not denied by the defendants, whether by virtue of the agreement entered into between the first defendant and Chinna Satyabhama which the plaintiff is said to have ratified, or whether by a custom recognised in the dancing girl community, that the plaintiff's branch was entitled to a half of Sattappa's property. The plaintiff, however, claims the whole, which the Courts below rightly denied him.

The appeal is dismissed with the costs of the contesting respondents. The appellant must pay the court-fee due to Government.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

The District Board, Tanjore by the President, represented by the Power of Attorney agent .. *Appellant**

v.

P. Kuppuswami Konar *alias* Kuppuswami Pillai and others .. *Respondents.*

Provincial Small Cause Courts Act (IX of 1887), section 16—Suit of a small cause nature tried as an original suit—Decree—Appeal—Maintainability—Jurisdiction of appellate Court to set aside decree and direct return of plaint for presentation to proper Court.

A suit which was really of a small cause nature was filed before the District Munsiff as an original suit but with a court-fee on the basis that it was of a small cause nature and was tried as an original suit and decreed. In an appeal against the decree, on an objection as to the insufficiency of the court-fee paid, the Subordinate Judge found that the suit was really of a small cause nature and instead of dismissing the appeal on that finding, he set aside the decree and directed the District Munsiff to return the plaint to the plaintiff for presentation to the proper Court (*i.e.*), to itself on the small cause side. In an appeal against that order,

Held, that once the Subordinate Judge found that the suit was of a small cause nature, he should have rejected the appeal on the ground that no appeal lay. But what he had done was in effect to entertain the appeal and interfere with the decree passed in a suit of a small cause nature which is not permitted by law and hence the order passed by him should be set aside and the appeal before him dismissed.

Appeal against the order of the Court of the Subordinate Judge, Tanjore, dated 25th August, 1945, in A.S. No. 66 of 1944 (O.S. No. 226 of 1942, District Munsiff's Court, Pattukottah).

K. Kuttikrishna Menon for Appellant.

M. S. Venkatarama Aiyar for Respondents.

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1. (1864) 2 M.H.C.R. 196.

* A.A.O. No. 687 of 1945. 29th January, 1947.

The Court delivered the following

JUDGMENT.—This is a civil miscellaneous appeal filed by the plaintiff in a suit against an order of the Subordinate Judge of Tanjore setting aside the decree in O.S. No. 226 of 1942 on the file of the District Munsiff of Pattukottah and directing the plaint to be returned to the plaintiff for presentation to the proper Court. The question arose in this way. The suit which was really of a small cause nature was filed before the District Munsiff as an original suit but with a court-fee on the basis that it was of a small cause nature. The suit was tried as an original suit and there was a decree in favour of the plaintiff. The defendants preferred an appeal which was heard by the Subordinate Judge. The Court-fee Examiner took an objection that the court-fee paid was insufficient as the suit was not cognizable by a Court of small causes. The Subordinate Judge went into this question and came to the conclusion that the suit was of a small cause nature. On this finding, instead of dismissing the appeal on the ground that no appeal lay, he set aside the decree of the lower Court and directed it to return the plaint to the plaintiff for presentation to the proper Court, *viz.*, to itself on the small cause side. In effect therefore he entertained the appeal, without his having done so he had no right to make an order setting aside the decree of the lower Court and directing a return of the plaint. If the suit is really of a small cause nature, and it is not disputed that is so, the Subordinate Judge had no jurisdiction whatever to interfere with the decree of the District Munsiff even though the latter proceeded on the basis that the suit was triable as an original suit and not as a small cause suit. If the appellate Court without this objection having come to its notice confirmed the decree on appeal, this Court would not have interfered with the decision in revision, merely on the ground that a suit of small cause nature was wrongly tried as an original suit. If it had set aside the decree, this Court could have in revision interfered and set aside the appellate decree as passed without jurisdiction. This was held in the Full Bench decision in *Kollipara Seethapathi* v. *Kantipati Subbayya*[1]. The Subordinate Judge relies upon *Ramaswami Chettiar* v. *R. G. Orr*[2]. But it was a case where there was no resort to the appellate Court. The question was whether the decree of the District Munsiff passed in a suit tried as an original suit even though it was really of a small cause nature should be set aside under the revisional jurisdiction conferred on the High Court by section 622 of the then Code of Civil Procedure. Sir Arnold White, C.J., took the view that in the circumstances there was an exercise of jurisdiction not vested in the Court by law and that therefore all the proceedings in the suit will be set aside and the plaint should be returned to the proper Court. But in the Full Bench decision in *Kollipara Seethapathi* v. *Kantipati Subbayya*[1], this decision is approved only in so far as it was necessary to set aside the appellate decision which reversed the decision of the District Munsiff. There is no approval of the course adopted by the learned Chief Justice. It is really futile and meaningless that merely because a suit which would have been tried in a summary way as it was of a small cause nature was tried as an original suit by mistake of the plaintiff and the Court concurred in by the defendant, the decree should be set aside in revision on no other ground but for the reason that the jurisdiction invoked was not the small cause jurisdiction but the original jurisdiction.

Once the learned Subordinate Judge found that the suit was of a small cause nature, he should have rejected the appeal. What he has done is to interfere with the decree passed in a suit of a small cause nature which is not permitted by law. The order of the Subordinate Judge is set aside and the Appeal No. 66 of 1944 pending on his file will stand dismissed. In the circumstances of this case where the mistake was common to all the parties and to the Court, there will be no order as to costs here and before the Subordinate Judge.

V.S. ——— *Appeal allowed.*

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1. (1909) 20 M.L.J. 718 : I.L.R. 33 Mad. 323 (F.B.). 2. (1902) 12 M.L.J. 264 : I.L.R. 26 Mad. 176.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Kashavlal Joshi .. *Petitioner**

v.

M. K. A. Sankara Iyer and others .. *Respondents.*

Usurious Loans Act (X of 1918), *section* 3 (1), *proviso* (ii)—*Applicability—Claim in suit on a promissory note settled out of Court by execution of another promissory note and suit dismissed—Suit on new promissory note—Provisions of section* 3 *of Usurious Loans Act—If attracted and previous transaction if can be re-opened and relief given in respect of excessive interest paid.*

A suit on a promissory note was dismissed as settled out of Court by execution of a fresh promissory note. In a suit on the fresh promissory note the provisions of section 3 of the Usurious Loans Act were invoked. It was contended that since the earlier transaction had been the subject of a suit it was not open to the Court to reconsider the same and apply the Usurious Loans Act.

Held, as the claim of the creditor had not been adjudicated upon or embodied in a "decree" in the previous suit, there was no bar to re-consideration of the matter and re-opening of the transaction. Such re-opening will not in any way affect the previous decree of the Court which was merely one dismissing the plaintiff's claim.

Accordingly, the transaction was one which attracted the provisions of the Usurious Loans Act and the debtor can therefore be relieved of all liability on account of excessive interest already paid.

Distinction between the Indian Act and corresponding provisions of the English Act discussed and *Cohen* v. *Jonesco*, (1926) 1 K.B. 119, distinguished.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decree, dated 20th March, 1945 and passed in N.T.A. No. 122 of 1944 in S.C.S. No. 2424 of 1943 on the file of the Court of Small Causes, Madras.

K. S. Rajagopala Aiyangar for Petitioner.

S. Amudachari for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner brought a suit in the Court of Small Causes, Madras, on a promisory note. An earlier suit had been filed which had been settled out of Court by the execution of the suit promissory note. The Court noted that the matter had been settled (and presumably dismissed the suit). During the hearing of the present suit, the provisions of section 3 of the Usurious Loans Act were invoked and the Court was asked to re-open the transaction, take an account between the parties, and relieve the debtors of all liability on account of the excessive interest already paid. The Court did so. On a point of law, an application for a new trial was made ; and the only question considered by the Full Bench was whether the transaction was one which attracted the provisions of the Usurious Loans Act. The Full Bench agreed with the trial judge and dismissed the application. The result was that the suit was dismissed.

It is argued here that since the earlier transaction between the parties had been the subject of a suit, it was not open to the trial Judge to reconsider in the present suit matters which had already been the subject of a suit. In support of this argument, the learned advocate for the petitioner has referred to a decision of Finlay, J., in *Cohen* v. *Jonesco*[1]. In that case, the prior transactions had come up before a Judge and a decree on those prior transactions had been passed. The decision was of course based on the corresponding English Act, which is similar in its terms to the Indian Act, but does not contain a proviso such as that to which I shall presently refer. The learned Judge, regretting the absence of any authority on this point, said :

> "I think that if it had been intended to give the Court power to re-open a former transaction between the parties, notwithstanding that it had been the subject of a judgment, the section must have specifically mentioned a judgment."

In other words, the learned Judge read into the Act an implied proviso that it would not apply to transactions that had been the subject of a judgment. In the

*C.R.P. No. 1001 of 1945. 21st February, 1947.

1. (1926) 1 K.B. 119.

first place, it is pretty clear that the learned Judge refused to consider those transactions, because they had been incorporated in a decree in favour of the creditor. In the present case, the claim of the creditor had not been adjudicated upon in the previous suit and had not been embodied in a decree. If there was a decree or a judgment, it must have been one dismissing the suit. So it cannot be argued that the transactions were the subject of an adjudication in the former suit and had been embodied in a decree.

There is another reason, however, why this English decision should not be applied to the present case; and that is that it is not open to Courts in India to read into a provision of a statute an implied proviso when there is a proviso dealing expressly with the point in question. The Indian Act, proviso (*ii*) to section 3 (1), says that:—

"in the exercise of these powers, the Court shall not do anything which affects any decree of a Court."

It is clear that in re-opening this transaction the Court did not in any way affect the previous decree of the Court, which was merely one dismissing the petitioner's claim.

The petition is dismissed with costs.

K.S. *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. FREDERICK WILLIAM GENTLE, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE RAJAMANNAR.

Vasireddi Srimanthu and others .. *Appellants**

v.

Devabhaktuni Venkatappayya and another .. *Respondents.*

Civil Procedure Code (V of 1908), sections 39 and 21—Transfer of decree for execution—Attachment of property in execution by transferee Court—Removal of that property from the jurisdiction of the transferee Court to another Court—Jurisdiction of the former Court to order sale of that property thereafter—Sale, when held, if a nullity—Objection to jurisdiction not raised by judgment-debtor—Right of other creditors of the same judgment-debtor to proceed against that property.

Where a Court which passes a money decree transfers that decree to another Court for execution and in an execution petition for attachment and sale of immoveable property belonging to the judgment-debtor situate within the territory of the transferee Court an order for attachment has been made by that Court and the property is thereafter removed from the territory of the transferee Court to another Court, the former Court can make no order for sale of that property by Court auction so as to give a good title to the purchaser. A Court cannot make a valid order for sale in execution unless, at the time the order is made, the property is within its territory and a sale ordered otherwise would be a nullity. Though an objection to the jurisdiction of the executing Court to order sale is not taken by the judgment-debtor, it would be open to other judgment-creditors of the same judgment-debtor to proceed in execution against the property so sold as the sale is a nullity. When a Court has no jurisdiction no agreement or act of a party can confer jurisdiction which it does not possess. Section 21 of the Civil Procedure Code does not cover an objection going to the nullity of an order on the ground of want of jurisdiction.

Appeal against the decree of the Court of the Subordinate Judge, Tenali, dated 14th July, 1945, in A.S. No. 187 of 1944 preferred against the decree of the Court of the District Munsiff, Tenali, dated 31st August, 1944, in O.S. No. 215 of 1941.

The Advocate-General (*K. Rajah Aiyar*) and *M. S. Ramachandra Rao* for Appellants.

B. V. Ramanarasu for Respondents.

(In pursuance of an order of reference to the Full Bench by Sir Lionel Leach, C.J. and Lakshmana Rao, J., this appeal coming on for hearing, the Court delivered the following):—

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* S.A. No. 1374 of 1945. 28th February, 1947.

JUDGMENTS.—This second appeal has been referred to a Full Bench by Sir Alfred Lionel Leach, C.J. and Lakshmana Rao, J. The order of reference, dated 9th January, 1947, is as follows :

> " The question which arises in this appeal is one of considerable importance. There is a Bench decision of this Court which is directly in point—*Veerappa Chetti* v. *Ramaswami Chetti*[1]. The learned Advocate-General has, however, submitted that the judgment requires reconsideration in view of the observations of the Full Bench in *Ramier* v. *Muthukrishna Aiyar*[2]. He has contended that inasmuch as a trial Court retains jurisdiction in spite of a notification transferring the jurisdiction to another Court, the same principle should apply to a Court to which a decree is sent for execution when the alteration in jurisdiction takes place after the Court is seised with the case. The question is one which may often arise and the properties here are of a very considerable value. In these circumstances we direct that the appeal be placed before a Full Bench."

Shortly, the circumstances giving rise to the appeal are :

When the Court which passes a money decree transmits the decree to another Court for execution and when an execution petition is pending for attachment and sale of immoveable property belonging to the judgment-debtor situate within the territory of the transferee Court and after an order for attachment has been made by that Court, the property is removed from the territory of the transferee Court to another Court, whether :

(1) the transferee Court can make an order for sale of the property by Court auction so as to give a good title to the purchaser ;

(2) if the transferee Court has no jurisdiction but the judgment-debtor does not take objection to jurisdiction at the time of the order for sale and during the execution proceedings, a judgment-creditor in execution of a decree in another suit, seeking to attach and sell the property can question the jurisdiction of the Court, by which the property was sold, and the validity of the sale.

The relevant facts can now be stated. On 7th July, 1931, a money decree was passed against one Venkata Subbiah, by the Court of the District Munsiff of Guntur. The decree was transferred to the Court of the District Munsiff of Bapatla for execution. On 6th February, 1933, an execution petition was filed in the Bapatla Court for attachment and sale of immoveable property belonging to the judgment-debtor situate within the territory of that Court. On 7th February, 1933, an order for attachment was made. On 22nd June, 1933, the Court ordered sale of the property to take place on 10th August on which date it was sold at a Court auction to the appellants. The sale was confirmed on 16th September and a sale certificate was issued on 16th November, 1933, by the Bapatla Court in favour of the appellants. Meanwhile on 9th May, 1933, after the Bapatla Court had made the order for attachment but before it ordered the property to be sold, a Government notification was issued transferring to the District Munsiff's Court of Tenali, as from 29th May, the territory in which the property was situated. The judgment-debtor did not take objection against the jurisdiction of the Bapatla Court at any stage of the execution proceedings. On 18th March, 1938, the respondents obtained, in appeal to the High Court from the Subordinate Judge's Court of Guntur, a decree for specific performance of an agreement for the sale of some property (not the property the subject of the present appeal), mesne profits and costs against Venkata Subbiah and others ; in respect of the money portion of this decree, it was transferred to the Bapatla Subordinate Court for execution, as the property in suit subsequently was re-included in the territory of that Court. The property was attached, the appellants preferred a claim against the attachment by virtue of their purchase in 1933. This claim was allowed. On 4th September, 1941, the suit out of which this appeal arises, was instituted in the District Munsiff's Court of Tenali by the respondents against the appellants to set aside the order in the claim petition. The suit was decreed in the respondents' favour and an appeal by the appellants to the Court of the Subordinate Judge of Tenali was dismissed on 14th July, 1945. This is the appellants' (defendants' in the suit) second appeal against the decision of the lower Courts.

1. (1919) 37 M.L.J. 442 : I.L.R. 43 Mad. 135.

2. (1932) 62 M.L.J. 687 : I.L.R. 55 Mad. 801 (F.B.).

The notification dated 9th May, 1933, provides, so far as relevant for the present consideration, as follows :

"In supersession of all previous notifications, regarding territorial jurisdiction of the Courts of the District Munsiffs in the Guntur District, the High Court hereby directs and notifies that from and after 29th May, 1933, the Courts of the District Munsiffs in the said District shall have and exercise local jurisdiction as stated below :—

(2) District Munsiff's Court, Tenali.

(v) Ponnur Firka.

(6) Chebrole."

The property in question is situate in Chebrole.

The notification is expressed to be in supersession of all previous notifications by which, *inter alia*, jurisdiction was conferred upon the Bellary Court in respect of immoveable property in Chebrole. It follows that, on and from 29th May, 1933, the property in question was removed from the territorial jurisdiction of the Bapatla Court, it became part of the territory of the Tenali Court, which thenceforth had jurisdiction with respect to it.

Section 39 of the Code of Civil Procedure enacts that :

"(1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court;

(*b*) if such person (the judgment-debtor) has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court ;

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction."

Since sub-section (1) of the section requires a decretal Court to send its decree to another Court for execution when a judgment-debtor's property is within the jurisdiction of that Court, it must follow that a decretal Court cannot itself execute against property outside its own territory; if it could do so transmission would be unnecessary. Further manifestation of this proposition is found in sub-section (2) which enables a decretal Court *suo motu* to transmit its decree for execution to a subordinate Court, but only to one of competent jurisdiction ; this must mean a Court which has jurisdiction, that is to say, a Court within whose limits the property against which execution will lie is situate.

Section 42 of the Code enacts that,

"The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself."

Since a decretal Court can execute only in respect of property lying within its territory, it follows that that is the extent of a transferee Court's jurisdiction.

The Code provides two exceptions to the above restriction upon the power of a Court to execute :

(*a*) Where a suit is to obtain relief respecting, compensation for, or wrong to, immoveable property situate within the jurisdiction of different Courts, section 17 allows a suit to be instituted in any Court within whose territory any portion of the property is situate ; since such Court has jurisdiction to entertain such suit, it has also jurisdiction to execute against the outlying properties, in respect of which it can pass a decree :

(*b*) Under Order 21, rule 3 of the Code, where immoveable property forming one estate is situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate.

The above provisions of the Code would be unnecessary if a Court could execute a decree against outlying property and the presence in the Code of those enactments manifests the ordinary restriction upon a Court's powers of execution.

Now returning to the facts of the present case when the decree of 1931 was sent by the Guntur Court to the Bapatla Court for execution, the property in question was within the territory of the latter Court and the transmission complied

with the provisions of section 39. The state of affairs regarding location of the property was the same when the execution petition was presented and the order for attachment of the property was made by the Bapatla Court in February, 1933. When, however, that Court made the order for sale in June, 1933, sold the property in August and issued the sale certificate in November, 1933, the property had ceased to be within its territorial jurisdiction, having been transferred to the Tenali Court.

Subject to what hereinafter appears, since a Court, save for the two exceptions above mentioned which are not in point in the present instance, has not jurisdiction to execute in respect of property which is situate outside its territory, the Bapatla Court had no jurisdiction to make the order for sale of the property in question and the sale of it was effected without lawful authority.

The learned Advocate-General, on behalf of the appellants contended that, upon presentation of a petition in execution of a decree in respect of property situate within the territory of the Court to which it is presented, thereby, that Court takes cognizance of its subject-matter and has seisin of the property against which execution is sought ; the removal of the property from the territorial jurisdiction of that Court, before an order for sale is made, does not deprive it of jurisdiction to execute the decree, but it retains jurisdiction as if the property had remained within its territory. Reliance for this proposition was placed upon *Chockalingam Pillai* v. *Velayudha Mudaliar*[1] and *Ramier* v. *Muthukrishna Aiyar*[2].

In *Chockalinga's case*[1] a mortgage suit was instituted in a Court ; thereafter the hypotheca was removed from its territorial jurisdiction ; later, a final decree for sale was passed by the Court. In a suit brought to set aside the decree on the ground that it was void for want of jurisdiction, the finding was that the mortgage decree was valid. After referring to some authorities which held that the withdrawal of jurisdiction from a Court does not affect suits which have been instituted in it, Phillips, J., observed, at page 451 of the report, that :

> "The jurisdiction of a Court consists in its power to entertain suits and when once a suit has been properly entertained, it is difficult to understand how that jurisdiction is removed unless it is specifically so done by the order of a competent authority. Once the suit has been entertained, the remaining proceedings taken therein are not taken by reason of any particular territorial jurisdiction but in exercise of the powers vested in the Court to try suits generally and consequently the only time at which the territorial jurisdiction comes into operation is at the time of filing the suit. Once the Court has seisin of the case, it has jurisdiction to try it to its conclusion, unless there is any reason for holding that that jurisdiction has been removed."

The learned Judge then referred to section 21 of the Code, which provides that, unless objection is taken to the place of suing at the earliest possible opportunity, no objection in that behalf, shall be allowed by any appellate or revisional Court, and, at page 452, he observed that the section has been extended in *Zamindar of Ettayapuram* v. *Chidambaram Chetti*[3], to execution proceedings. The decision in *Zamindar of Ettayapuram's case*[3] was that if a party does not raise objection to jurisdiction when a preliminary mortgage decree is made absolute, *i.e.*, when an order for sale of property is made, he is not entitled to plead in execution that the order was passed without jurisdiction. At page 686 of the report Sir John Wallis, C.J., observed that the effect of section 21 is that objections which the appellate or revisional Court is thereby precluded from allowing must be considered cured for all purposes unless they were taken before the passing of the decree in the original Court. It was not held that section 21 applied simpliciter to execution proceedings but the decision was that it applied to a suit in which objection could have been taken to jurisdiction before a decree had been passed and that the failure to take objection in the suit precluded it being done at any later stage, including proceedings in execution. Section 21 refers to objection as to a place of "suing". An execution petition is not a suit and its presentation is not "suing". In *Chockalinga's case*[1] a suit was instituted in a Court which, at the date of institution, had jurisdiction to entertain the suit and thereby the Court obtained seisin of the suit and its subject-matter. The subsequent proceedings in the suit were in exercise of the powers

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1. (1924) 47 M.L.J. 448.
2. (1932) 62 M.L.J. 687 : I.L.R. 55 Mad. 801 (F.B.).
3. (1920) 39 M.L.J. 203 : I.L.R. 43 Mad. 675.

vested in the Court to try the suit; those powers were not taken away by the subsequent removal of from its territory of the property. A Court does not obtain seisin of the property which is the subject of an execution petition upon its presentation; the presentation of an execution petition is not "suing". An order for attachment of property confers no right upon the execution petitioner, all it does is to make a subsequent private transfer or delivery of the property void against all claims enforceable under the attachment (*vide* section 64 of the Code).

The decree, in the present case, was sent for execution to the Bapatla Court because, at that time, the property was within its territory and, by reason of that instance, it had jurisdiction to order execution against the property. It had not lost its jurisdiction when the execution petition was presented to it and when it made the order for attachment. But, the presentation of the petition did not give the Court seisin over the property nor did it confer any right upon the execution creditor when it made the order for attachment. When the Bapatla Court made the order for sale, it had no longer jurisdiction over the property so as to be able to execute the decree. Section 39 is clear and unambiguous in its meaning and effect; a Court passing a decree must have territorial jurisdiction in respect of property against which it can order execution; if it has not got that jurisdiction it cannot order execution and must send the decree for that purpose to the Court competent to do so. Section 42 confers like powers in execution upon a transferee Court and, it will follow, such Court is subject to the same limitation as the Court which passed the decree. Whilst I agree with the observation of Phillips, J., in *Chockalinga's case*[1] which I have quoted, with respect, I am unable to subscribe to his opinion, that the principles relating to a suit were extended in *Zamindar of Ettayapuram case* to execution proceedings.

The other authority upon which the learned Advocate-General relies is *Ramier's case*[2] a decision of a Full Bench. There, a final decree was passed in a mortgage suit, subsequently the Court ceased to have territorial jurisdiction over the mortgaged property which was removed to another Court's territory. The actual decision in that case is that the latter Court could not execute the decree without it being transmitted for that purpose by the Court passing the decree. In the judgment of the Court, delivered by Ramesam, J., the effect is discussed of the notification by which the transfer of the territory had been made and whether, within the contemplation of section 150 of the Code, the business of the Court had been transferred. It was held there had been no such transfer. In the present case, the notification did not transfer the business from Bapatla to Tenali, and it was argued for the appellants, that the former Court consequently retained jurisdiction to dispose of the execution petition which had been presented to it before the transfer of the property from the Court's territory.

In this respect the observations previously made regarding the position and the powers of a Court with respect to a pending suit and a pending execution petition are in point and do not require repetition. *Ramier's case*[2] would be an authority in the appellants' favour if the principles relating to a suit also applied to an execution petition, which, in my view, they do not. Incidentally it is to be noticed that, in *Ramier's case*[2] a decree for sale was passed by the Court before its territorial jurisdiction was removed, in the present case the order for sale was made after the removal.

A decision of a Bench of this Court, directly in point, is found in *Kasi Viswanathan Chetti* v. *Murugappa Chetti*[3]. There, a decree of a Burma Court was transmitted for execution to the District Court of Ramnad which sent it to the Subordinate Court of Ramnad for that purpose. In the judgment it was presumed that, when the decree was sent to the Subordinate Court, Ramnad, that Court had territorial jurisdiction over the property against which execution by way of sale was sought. The property was transferred to the territory of the Sivaganga Court and thereafter the Ramnad Court ordered sale of it in execution and it was sold. It was

1. (1924) 47 M.L.J. 448.
2. (1932) 62 M.L.J. 687 : I.L.R. 55 Mad. 801 (F.B.).
3. (1917) 33 M.L.J. 750.

held that the sale was invalid because, on the date when it took place, the Ramnad Court had ceased to have territorial jurisdiction over the property. At page 752 of the judgment of the Court it was observed that

> "if the lower Court was at any time competent to execute the decree in virtue of any transfer to it prior to 15th April, 1943" (when the property was transferred to the territory of the Sivaganga Court), "it forfeited its competence to keep the suit property under attachment or to sell it from that date."

That decision was given some 30 years ago, no authority has been forthcoming in which its correctness has been challenged, it certainly has not been overruled. It was referred to in *Veerappa Chetti* v. *Ramaswami Chetti*[1], which held that a Court to which a decree is sent for execution has no jurisdiction to order either attachment or sale of immoveable property in execution, if, at the time of the order, the Court had no territorial jurisdiction over the property. *Khirod Chandra Ghosh* v. *Panchu Gopala Sadhu Khan*[2], followed Veerappa Chetti's case and held that a sale by an executing Court of a property which is outside its territorial jurisdiction is a nullity.

I can find no reason to disagree with the last three authorities cited which, in my opinion, correctly lay down the principle of law decided by them. The position of a suit is different from that of an execution petition regarding property which is the subject matter of the respective proceedings pending at the time of removal from the territorial limits of its jurisdiction. A suit is not governed by and subject to sections 39 and 42 of the Code which require the Court passing a decree or the Court to which it is transmitted for execution, as the case may be, to have property within its territory so as to confer jurisdiction to order execution against the property. A Court cannot make a valid order for sale in execution unless, at the time the order is made, the property is within its territory. Any sale effected pursuant to an order made without jurisdiction is not in conformity with the requirements of the Code and is invalid.

It follows, that the sale by the Bapatla Court to the appellants was one which took place without lawful authority; it is a nullity and does not prevent the respondents executing their decree against the property.

Since the sale to the appellants was made by a Court not having jurisdiction in that behalf and the sale was a nullity the second question does not require to be answered for the purpose of disposing of this appeal. But it is convenient, shortly, to express an opinion with regard to it.

It was argued that objection to the jurisdiction of the Bapatla Court should have been taken by the judgment debtor in the execution proceedings and, since this was not done, the respondents who seek to execute another decree against the property, cannot now take the objection and, by some doctrine of espoppel or waiver, they are prevented from asserting the Bapatla Court's want of jurisdiction. By this argument it is sought to apply the principle in section 21 of the Code, upon which I have previously made some observations. Firstly, the respondents were not parties to the execution proceedings and they are not bound by the act or failure of any party thereto. Secondly, the appellants, also, were not parties. The claims by the appellants and the respondents are not adverse to the judgment-debtor, they are adverse to each other, each claiming in right of the judgment-debtor.

When a Court has no jurisdiction, no agreement or act of a party can confer jurisdiction which it does not possess. In *Ramabhadra Raja Bahadur* v. *Maharajah of Jeypore*[3], it was pointed out by the Judicial Committee at page 820 of the report that section 21 does not cover an objection going to the nullity of an order on the ground of want of jurisdiction. In *Veerappa Chettiar's case*[1] after referring to this decision of their Lordships of the Privy Council, Seshagiri Aiyar, J., observed

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1. (1919) 37 M.L.J. 442 : I.L.R. 43 Mad. 135.
2. (1939) I.L.R. 18 Pat. 670.
3. (1919) 37 M.L.J. 11 : L.R. 46 I.A. 151 : I.L.R. 42 Mad. 813 (P.C.).

at page 140 of the report, in that case, that section 21 did not bind in terms persons like execution creditors.

With regard to property which has been sold in execution pursuant to an order made by a Court after its territorial jurisdiction over the property had been removed Fazl Ali, J., as he then was, observed at page 675 of the report in *Khirod Chandra Ghosh's case*[1] that,

"It may be that the judgment debtor himself may have made it impossible for himself owing to his conduct to assert that such a person has no title to the property but the fact remains that the property continues to be the property of the judgment-debtor."

Elsewhere at page 675 he says,

"If a Court which has no jurisdiction to sell a property, sells it, it is clear that the purchaser acquires no title to it."

In *Richards* v. *Johnston*[2], Pollock, C.B., said :

"A sheriff who comes to seize the goods of a debtor, armed with a writ of execution in favour of a creditor, is not bound by estoppel which might have prevented the debtor himself from claiming the goods,"

and Martin, B., observed :

"No authority has been cited to show that a judgment creditor is party or privy to the acts of the judgment debtor. The *fi. fa.* directs the sheriff to seize the goods of the debtor. The sheriff is a stranger to the debtor and the only question for him is—Are these goods the goods of the debtor or not? Therefore on this rule we must say that the sheriff and the executing creditor are not bound by the estoppel which would affect the execution debtor."

This decision was cited with approval by Lord Esher M.R., at page 457 in *Richards* v. *Jenkins*[3]. Reference to those two decisions of the Courts in England was made with approval in *Veerappa Chetti's case*[4] in which it was held that, although a judgment-debtor who does not object to a confirmation of a sale by a Court making an order for sale when it had no jurisdiction, may be estopped from raising the question that the sale was a nullity, such estoppel does not operate against a subsequent purchaser of the same property in a sale by a Court of competent jurisdiction in execution of another decree against the same judgment-debtor.

In the present case, whatever would be the position of the judgment debtor regarding the sale of the property by the Bapatla Court if he sought to have the sale set aside or made any claim to the property, upon which I express no opinion, the sale being a nullity and without jurisdiction, the judgment-debtor, in so far as the respondents are concerned, remained the owner of the property and the appellants did not obtain a title to it in the sale by the Court having no jurisdiction to sell. The respondents are not prevented from asserting the absence of jurisdiction in the Bapatla Court to make an order for sale and to sell the property.

For the reasons given, in my view, the appeal should be dismissed with costs. Advocate's fees Rs. 200.

Lakshmana Rao, J.—I agree.

Rajamannar, J.—I agree.

V.S. *Appeal dismissed.*

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1. (1939) I.L.R. 18 Pat. 670.
2. (1859) 4 H. and N. 660 : 157 E.R. 1002.
3. (1883) L.R. 18 Q.B.D. 451.
4. (1919) 37 M.L.J. 442 : I.L.R. 43 Mad. 135.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

Velicheti Satyanarayana .. *Appellant**

v.

Koppaka Venkataramayya (minor) represented by father and guardian Satyam and others .. *Respondents.*

Madras Co-operative Societies Act (VI of 1932), section 57—Scope and powers of interference by Provincial Government with orders of its subordinate officers—Nature of jurisdiction and functions exercised under—Sale on award—Suit to set aside dismissed—Subsequent application to Registrar under section 57 of the Co-operative Societies Act to set aside sale also dismissed—Further application to Provincial Government to set aside the sale—Provincial Government setting it aside without notice to purchaser—Legality.

To enable a decision to be made regarding the correctness or otherwise of a decision which the Local Government calls for and examines pursuant to section 57 of the Madras Co-operative Societies Act, it must properly consider all the facts, circumstances and legal principles involved. There is nothing in that section which empowers the Provincial Government autocratically, and at its own whim and pleasure, to interfere with the decision made by an authorised officer when exercising judicial functions. When reviewing such a decision the Provincial Government must act in the same way and to the same extent as the officer whose decision is under review. When exercising its powers given by the section the Provincial Government is in the same position as the officer, in that it exercises judicial and not administrative functions. A decision which has to be made under section 57 of the Act can only be judicially arrived at and when a judicial decision has to be made, opportunity must be afforded to parties interested or concerned to be heard before the decision is given. Section 57 of the Act requires notice to be given to the party likely to be affected before an order can be made and if the powers given by the section are exercised without the potentially affected party being given an opportunity of being heard the order is one which is *ultra vires* the powers of the authority exercising it.

Where after unsuccessful attempts by way of a regular suit and an application to the Registrar under section 57 of the Madras Co-operative Societies Act to set aside a sale held on an award under the Act, an application was made to the Provincial Government under section 57 of the Act and the sale was set aside without giving notice to the purchaser whose sale had been confirmed to whom a sale certificate had been granted and who had been put in possession of the property sold and was in enjoyment of it for nearly 6 years,

Held, that in making the order setting aside the sale the Provincial Government acted without due and proper exercise of its powers and jurisdiction under section 57 of the Act and the order which it made was a nullity and was invalid.

Appeal under clause 15 of the Letters Patent from the judgment of Somayya, J., dated 26th April, 1946, in S.A. No. 1165 of 1945 preferred to the High Court against the decree of the Court of the Subordinate Judge of Narasapur, dated 15th February, 1945, in A.S. No. 179 of 1943, preferred against the decree of the Court of the District Munsiff of Narasapur, dated 26th June, 1943, in O.S. No. 96 of 1942.

P. Satyanarayana Rao and *A. Sambasiva Rao* for Appellant.

Ch. Raghava Rao for Respondents.

The Court delivered the following

JUDGMENTS : *The Chief Justice.*—This is an appeal pursuant to the Letters Patent of this Court by the plaintiff in the suit from a judgment of Somayya, J., sitting in second appeal, reversing the learned Subordinate Judge of Narasapur, who dismissed an appeal from the learned District Munsiff of Narasapur. The matter for determination is whether an order passed by the Provincial Government under section 57 of the Madras Co-operative Societies Act VI of 1932 (hereinafter called " the Act ") is valid.

The facts are a little complicated, but, so far as they are relevant to this appeal, they can be shortly stated.

On 8th January, 1935, the plaintiff purchased an immoveable property at a sale in execution of a decree upon an award passed under the Act. On 6th March, 1935, the sale was confirmed and on 17th September of the same year a sale certificate was issued to the plaintiff and he was put in possession of the property. Before the confirmation of the sale the first defendant in the suit, the respondent

* L.P.A. No. 86 of 1946. 7th February, 1947.

in this appeal, who is the nephew of the deceased original debtor, applied to the Deputy Registrar of Co-operative Societies to set aside the sale. This application was dismissed on 6th March, 1935, and on the same date the sale was confirmed. Later, the first defendant instituted a suit in the Court of the District Munsiff at Narasapur claiming to have the sale set aside. That suit was dismissed on the 18th April, 1938, and the first defendant's appeal to the Subordinate Judge against the decision of the District Munsiff was dismissed on 12th December, 1939. On 30th December, 1939, the first defendant applied to the Registrar of Co-operative Societies under section 57 of the Act to set aside the sale. On 8th May, 1941, this application suffered the same fate as other proceedings initiated by the first defendant. On 19th August, 1941, he made a further application under section 57, this time to the Provincial Government, seeking the same relief. Notice of this application was not given to the plaintiff who was ignorant of it being made, and without him having been given an opportunity to heard and without him being apprised of what was taking place. On 18th December, 1941, the Provincial Government passed an order setting aside the sale. The first defendant did not disclose, in his application to the Provincial Government, that he had previously applied to the Registrar and his application had been dismissed. On 2nd May, 1942, the plaintiff instituted the suit, out of which this appeal arises, in the Court of the District Munsiff of Narasapur claiming a declaration that the order of the Provincial Government was void, illegal and *ultra vires* of its powers and did not affect his rights to the property. The District Munsiff decreed the suit in favour of the plaintiff. His decision was upheld on appeal to the Subordinate Judge of Narasapur, but on second appeal to the High Court Somayya, J., reversed the lower Courts and held that the order of the Provincial Government was valid. He also directed that each party should bear his own costs throughout. This is the plaintiff's appeal from the learned Judge's reversal of the two lower Courts.

The position at the date when the order was passed by the Provincial Government is interesting. The plaintiff had purchased the property, paid the price, the sale to him had been confirmed, he had been granted a sale certificate and, by 17th September, 1935, he had been put in possession of the property. During the ensuing six years the first defendant unsuccessfully sought to have the sale set aside by the Deputy Registrar of Co-operative Societies in 1935, by a suit which was dismissed in 1938, by an appeal therefrom which was dismissed in 1939 and by an application in 1939 to the Registrar which was dismissed in 1941.

The question which has now to be considered is whether section 57 of the Act empowers the Provincial Government to allow an application made to it and to make an order setting aside a sale without the purchaser being given notice of the application and without him having an opportunity of presenting his case and of being heard. If there is no such power then, since the order made by the Provincial Government setting aside the sale was passed without notice and opportunity to the purchaser, the order of the Provincial Government is invalid and it will follow that a consideration of the other questions arising in the appeal will not be required.

Section 57 of the Act provides as follows :

"The Provincial Government or the Registrar may call for and examine the record of any enquiry or the proceedings of any officer subordinate to them for the purpose of satisfying themselves as to the legality or propriety of any decision or order passed and as to the regularity of the proceedings of such officer. If in any case it shall appear to the Provincial Government or the Registrar that any decision or order or proceedings so called for should be modified, annulled, or reversed, the Provincial Government or the Registrar, as the case may be, may pass such order thereon as to it or him may seem fit."

In regard to the phraseology of the above section Somayya, J., observed in his judgment as follows :

"It looks as if the Legislature has deliberately given very wide powers so that they (the Provincial Government) may do justice according to the needs of the situation untrammelled by any limitation or conditions."

The enquiry or proceedings mentioned in the section, in the present instance, was or were the subject of the record which the Provincial Government called for and examined, namely, the application to the Deputy Registrar and his dismissal of it which took place in 1935, six years prior to the application to, and the order by, the Provincial Government under section 57. In his judgment Somayya, J., observed that he was :

> "inclined to hold that the action of the local Government cannot be said to be vitiated for the reason that no notice was given to the respondent (the plaintiff in the suit and the appellant in the present appeal)."

In argument it was contended for the first defendant-respondent that the power and the authority given by section 57 to the Provincial Government is to act in an administrative capacity, and the order setting aside the sale was an order made in the exercise of administrative authority. It was also contended that, since the section is silent as to notice being given to the party who might be affected by an order, notice to him is unnecessary and an order can be made without notice being given. It is to be observed that the action taken by the Provincial Government and the order which it made, in effect, were to deprive the plaintiff of property which he had purchased and paid for and had occupied for some six years prior to the order being made and to make him a trespasser upon land for which he had paid the full purchase price and been put in possession.

In considering the meaning and effect of section 57 of the Act reference to section 115 of the Code of Civil Procedure is instructive. It reads as follows :

> "The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such Subordinate Court appears—(a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the cases as it thinks fit."

As in section 57 of the Act, section 115 of the Code of Civil Procedure empowers the record to be called for in a case which has been decided, and also, it does not mention that notice shall be given to the party who will be affected by an order which may be made by the High Court. The concluding words of both section 57 of the Act and section 115 of the Code confer powers to make an order which the High Court or the Provincial Government, as the case may be, thinks proper or fit. It is beyond doubt—and the contrary cannot be, and indeed has not been, suggested—that the High Court cannot make an order under section 115 of the Code adverse to any party in the absence of a notice being given to him, so that he may have an opportunity of being heard.

It is clear, and indeed it was not disputed, that when the Deputy Registrar dismissed the application by the first defendant to set aside the sale, the Deputy Registrar acted in a judicial capacity and exercised judicial functions. Section 57 requires an examination of the record by the Provincial Government which must be for the purpose of satisfying itself as to the legality or propriety of any decision or order and as to the regularity of the proceedings of the officer. It is only after the Government is satisfied with regard to the matter that it can pass an order contemplated by section 57. For the purpose of determining whether an order should be made for modification, annulment or reversal, the Provincial Government must first make a decision as to the legality or the propriety of the decision at the enquiry or as to the regularity of the proceeding under review.

Assistance is given by reference to a few authorities which now I propose to quote. In *Board of Education* v. *Rice*[1], the action of a local education authority was considered. It is observed by Lord Loreburn L.C., at page 182 of the report as follows :

> "In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind ; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything."

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1. (1911) A.C. 179.

Particular emphasis should be placed upon the concluding words of the quotation. In *Local Government Board* v. *Arlidge*[1], Viscount Haldane L.C., at page 133 referred with approval to the above quotation in *Rice's case*[2]. In *Wood* v. *Woad*[3], the action of a committee of a mutual insurance society was reviewed. At page 196 of the report Kelly, C.B., made the following observations :

"It is contended for the plaintiff that the language of the rules gives an unconditional and absolute power to the committee to expel a member of the society, and I agree that if the committee in fact exercised their power under the rules, their decision could not be questioned ; however unfounded the reasons for it may have been, it would have been final and could not be reviewed by any Court. But they are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."

In the present instance the civil consequence to the plaintiff of the order passed by the Provincial Government in his absence is to deprive him of the right to property which he had acquired six years before the order of deprivation was passed.

To enable a decision to be made regarding the correctness or otherwise of the decision which the Local Government calls for and examines pursuant to section 57, it must properly consider all the facts, circumstances and legal principles involved. I can see no provision in section 57 which empowers the Provincial Government autocratically, and at its own whim and pleasure, to interfere with the decision made by an authroised officer when exercising judicial functions. When reviewing such a decision the Provincial Government, in my view, must act in the same way and to the same extent as the officer whose decision is under review. When exercising its powers given by the section the Provincial Government is in the same position as the officer, in that it exercises judicial and not administrative functions. In my opinion it is beyond doubt that a decision which has to be made under section 57 can only be judicially arrived at. When a judicial decision has to be made, opportunity must be afforded to parties interested or concerned so as to give them an opportunity to be heard before the decision is given. The section not only empowers action by the Provincial Government but it confers similar powers upon the Registrar. I cannot think that there was ever an intention, and, in my opinion, the section does not go to the extent, of enabling interference by a Registrar with a judicial decision of an officer, behind the backs of interested parties in the absence of an opportunity to them of being heard so as to deprive those parties of rights which they had obtained by virtue of an order made by an officer duly appointed for the purpose. The Provincial Government is in exactly the same position as the Registrar with regard to the powers and the exercise of them given under section 57 . So far as material, the wording of section 57 corresponds to that of section 115 of the Code. There is nothing in section 57 from which it can ever be inferred that action under the section can be exercised differently to that under section 115 of the Code or to the corresponding section 435 of the Code of Criminal Procedure in regard to action by the High Court in criminal matters. Under the sections of both Codes, the person who may be affected by the exercise of the powers given by the sections must be given notice of the proceedings so as to enable him to have an opportunity to be heard before an order can be made. In the eighth edition of Maxwell on the Interpretation of Statutes, for which I am indebted to my learned brother, the position is succinctly summarised at page 316 where it is stated as follows :

"Again in giving judicial powers to affect prejudicially, the rights of person or property, a statute is understood as silently implying, when it does not expressly provide, the condition or qualification that the power is to be exercised in accordance with the fundamental rules of judicial procedure, such, for instance as that which requires that, before its exercise, the person sought to be prejudicially affected shall have an opportunity of defending himself."

In my view section 57 requires notice to be given to the party likely to be affected before an order can be made and if the powers given by the section are exercised

1. (1915) A.C. 120.
2. (1911) A.C. 179.
3. (1874) L.R. 9 Exch. 190.

without a potentially affected party being given an opportunity of being heard, the order is one which is *ultra vires* the powers of the authority exercising it.

I have no doubt that, in making the order setting aside the sale to the plaintiff, without notice being given to him of the first defendant's application to the Provincial Government and at a time when he was in ignorance of the course which was then being taken, the Provincial Government acted without due and proper exercise of its powers and jurisdiction under section 57 and the order which it made is a nullity and is invalid.

In my opinion the decisions of the District Munsiff and the learned Subordinate Judge of Narasapur were correct and that of Somayya, J., was wrong in setting them aside. This appeal must be allowed and the decree of the Subordinate Judge restored. The plaintiff-appellant is entitled to his costs both in this appeal and before Somayya, J., as well as the costs of the proceedings before the Subordinate Judge and the District Munsiff.

Rajamannar, J.—I agree.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

The Public Prosecutor .. *Appellant**

v.

Chakka Kondappa .. *Respondent.*

Madras Local Boards Act (XIV of 1920), section 228, and Sch. IV, rule 31—Prosecution for non-payment of profession tax levied by and due to District Board—Accused if and when barred from questioning legality of assessment when he has not appealed against the same in time.

Where a person is prosecuted for non-payment of profession tax due to a District Board, he is entitled to question the legality of the assessment even though he had failed to appeal against the assessment at the proper time thereby allowing the assessment to become final. It is for the prosecution affirmatively to prove that the accused is lawfully bound to pay the tax. Where it is found that notices in respect of the tax were not properly served on the assessee there is no substantial compliance with the provisions of the Act and the prosecution will not be sustainable.

Appeal under section 417, Criminal Procedure Code, 1898 against the acquittal of the aforesaid respondent (accused) by the Stationary Sub-Magistrate of Gooty in C.C. No. 237 of 1946 on his file.

The appellant (*V. L. Ethiraj*) in person.

K. S. Jayaram for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the Public Prosecutor from the acquittal of the respondent, Chakka Kondappa, in C.C. No. 237 of 1946 in the Court of the Stationary Sub-Magistrate, Gooty. The respondent was prosecuted under rule 33 (2) of the Rules in Schedule IV attached to the Madras Local Boards Act for non-payment of profession tax due by him and payable to the District Board, Anantapur in respect of the exercise of money-lending profession during the years 1944-45 and 1945-46. The total amount of tax which was demanded from him was Rs. 18-2-0 including a warant fee of two annas. In the charge sheet filed by the District Board President it was mentioned that the tax and the warrant fee due by the assessee could not be collected as he had refused to pay the tax when demanded by the Licence Inspector and also obstructed him in executing the warrant. The accused denied that he exercised the profession of money-lending during the periods in question within the limits of the District Board.

The Sub-Magistrate found on the facts and the evidence that it was not satisfactorily proved that he was exercising the money-lending profession as alleged by the prosecution and that the notices of demand were not served on him as required

* Crl. Ap. No. 645 of 1946. 6th March, 1947.

by law and that consequently he had no opportunity to prefer an appeal to the District Board, as is provided in the Local Boards Act. The prosecution, however, raised a legal contention at the time of the trial to the effect that since assessment had ben made and within the time fixed for appeal, no appeal had been filed, the assessment became final under the provisions of the Local Boards Act and it was not open to the accused to let in any evidence on the question of his liability to the tax, that is to say, on the question as to whether notices were properly served on him or not and whether he exercised the money-lending profession during the periods in dispute. The Sub-Magistrate negatived this contention also, and in the end acquitted the accused holding that no tax was lawfully due by and leviable from the accused by the Anantapur District Board.

Before me the learned Public Prosecutor did not question the findings of fact of the Sub-Magistrate; but he urged that on a proper scrutiny of the relevant provisions of the Local Boards Act it should be held that it was not open to the accused to raise the plea that he had not exercised the profession of money-lending in respect of which he has been assessed. Profession tax is leviable in a Local Board area under section 93 of the Act, and rule 11-A in schedule IV requires that notice should be served in the prescribed manner and in the prescribed form on the person who is liable to be assessed for the half year in question. Under rule 26 in the same schedule a right of appeal is provided, and then comes rule 31 which is to this effect:

"The assessment or demand of any tax, when no appeal is made as hereinbefore provided, and when such an appeal is made, the adjudication of the panchayat thereon, shall be final."

It is also necessary in this connection to refer to section 228 (1) of the Act which provides:

"No assessment or demand, made, and no charge imposed, under the authority of this Act shall be impeached or affected by reason of any clerical error or by reason of any mistake......... provided that the provisions of this Act have been, in substance and effect, complied with. And no proceedings under this Act shall merely for defect in form be quashed or set aside by any Court of justice."

Reliance is placed on behalf of the Crown on the expression "final" occurring in rule 31, and on the phrase in section 228 which refers to the compliance in substance and effect with the provisions of the Act and the bar against any proceedings under the Act being interfered with by a Court of justice merely on the ground of an error or mistake. On the other hand, the respondent wholly relies upon the provisions of section 228 for the purpose of contending that the bar arising under that section does not operate unless it is shown by the prosecution that there was substantial compliance with the provisions of the Act, for instance in the matter of service of notice and by way of proving that he had exercised a profession in respect of which he could be assessed to profession tax under the provisions of the Act. It is also argued by Mr. Jayaram with reference to rule 31 that the finality referred to therein is only for the purpose of the Act, and where the legality of the assessment is questioned whether in a civil suit or in a criminal proceeding there will be no bar arising either under the rule or under section 228.

This question has formed the subject matter of numerous decisions of this Court. I may start with referring to the leading case on the subject decided by Shephard and Boddam, JJ., reported in *Municipal Council, Coconada* v. *Standard Life Assurance Co.*[1]. That was a case that arose under section 262 of the District Municipalities Act corresponding to section 228 of the Local Boards Act. There the question was whether when the petitioner company was not doing business within the Coconada Municipality, a suit to question the correctness of its assessment to profession tax was maintainable in a civil Court. The matter was put specifically by the learned Judges in these words at page 213:

1. (1900) 10 M.L.J. 401 : I.L.R. 24 Mad. 205.

"The question really is whether when a company, which in respect of its particular business is not taxable under the Act or does not transact business within the Municipality, is nevertheless taxed, it can be said that 'the provisions of the Act have been in substance and effect complied with.' The question whether there has been a substantial compliance with the Act is one of fact which has to be determined with reference to the particular circumstances of the case."

Upon this view it was held that there was no difference in principle between the exaction of a tax which has not been legally imposed and the exaction of a tax from a person who is not taxable under the Act. In the latter case no less than in the former there has been a substantial disregard of the provisions of the Act.

Before I deal with the further cases which have consistently followed this view, I may dispose of the solitary ruling cited on behalf of the Crown which, it was contended, took the opposite view. That was the case in *Veeraraghavalu* v. *President, Corporation of Madras*[1], decided by Wallis, J., (as he then was) and Krishnaswami Aiyar, J. That case arose under section 172 of the City Municipal Act of 1904. It is hardly necessary to set out the facts of that case in detail and it is clear from the judgment of both the learned Judges that the decision proceeded entirely upon the particular language of section 172 of the Act of 1904 which was found to be radically different from the language of the corresponding section in the old City Municipal Act of 1884. Wallis, J., further observed :

". . . . . . . As regards the sections as to finality the provision in section 196 against suits to recover back taxes levied under the Act, provided the provisions of the Act had been substantially complied with, is omitted in section 177. Further, in section 191 which corresponds to section 208 of the old Act and saves irregularities due to defect of form, the words 'provided the directions of the Act be in substance and effect complied with' are omitted."

In view of these essential differences in the language of the relevant sections in the Act it was held that the decisions under the District Municipalities Act that persons not liable to the tax can sue to recover it back were clearly inapplicable under the City Municipal Act as they proceeded upon language which is not used in the latter Act. Consequently the decision in the *Municipal Council, Coconada* v. *The Standard Life Assurance Co.*[2] and the decisions referred to in that case were not acted upon. Krishnaswami Aiyar, J., also made observations at page 137 to the same effect.

Continuing the trend of the decisions in the *Municipal Council, Coconada* v. *The Standard Life Assurance Co.*[2], I may refer to *Balasuryaprasada* v. *The Taluk Board, Chicacole*[3], which was a decision under section 228 of the Local Boards Act. In that case the learned Judge has collected all the decisions which were given after the *Municipal Council, Coconada* v. *Standard Life Assurance Co.*[2], namely, *Municipal Council, Mangalore* v. *Codial Bail Press*[4], (decided under the District Municipalities Act), *Arunachalam Chettiar* v. *Namakkal Union Board*[5],—(Local Boards Act) and *Bombay Co., Ltd.* v. *Municipal Council, Dindigul*[6], and *Chairman, Municipal Council, Kumbakonam* v. *Rally Bros.*[7] (both under the District Municipalities Act). *Balasuryaprasada* v. *The Taluk Board, Chicacole*[3], was also a case of a person who was alleged to have been exercising money-lending profession and as such assessed to profession tax. The legality of the assessment was impugned in a Civil Court and the plaintiff contended that he was not exercising that profession. The lower Courts did not examine the contention on its merits but dismissed the suit as barred by sub-section (2) of section 228 of the Local Boards Act. Madhavan Nair, J., after reviewing the decision in the *Municipal Council, Coconada* v. *Standard Life Assurance Co.*[2], and the subsequent decisions mentioned above came to the conclusion that the complaint of the plaintiff being that he was not liable to be taxed under the Act, section 228 (2) was not a bar to the suit and that the lower Courts should have gone into the merits of the case and disposed of it in accordance with law. In one of the earlier cases referred to in that judgment the principle was laid down that where the Board has disregarded a provision of law and taxes a person who is not

1. (1910) 20 M.L.J. 773 : I.L.R. 34 Mad. 130.
2. (1900) 10 M.L.J. 401 : I.L.R. 24 Mad 205.
3. A.I.R. 1931 Mad. 822.
4. (1903) 14 M.L.J. 410 : I.L.R. 27 Mad. 547.
5. (1927) 54 M.L.J. 603.
6. A.I.R. 1929 Mad. 146.
7. (1930) 61 M.L.J. 748.

taxable at all, the jurisdiction of Courts is not ousted. Cases of fundamental departures from the meaning of the statute are excluded from the operation of the bar.

It is unnecessary to refer to the other cases which have dealt with the question of the jurisdiction of Civil Courts, and since this is a criminal case, I shall refer to the set of cases which have dealt with the right of an accused person in a prosecution of this kind to raise the question of his liability and the jurisdiction of the Criminal Court to examine that question on its merits. *Smith* in re[1], was a decision given by Krishnan, J., sitting singly in a case that arose under the City Municipal Act. In that case dealing with the argument used by the Magistrate in support of the assessment, namely, that as the accused did not go to the Standing Committee and seek redress before them, it should be taken as settled that the accused is bound to pay the tax imposed upon him that it had become final under the law and that the Magistrate could not question its legality, the learned Judge while expressing disagreement with that view pointed out that there could be no kind of estoppel in a criminal case and said,

"The prosecution must establish affirmatively to his satisfaction that the tax was payable and that there was a default in payment of the tax. The fact that the accused did not appeal to the Standing Committee cannot be treated as in any way preventing him from raising the plea before the Criminal Court, where he is sought to be convicted of an offence by the prosecutor."

This case, arising as it does under the City Municipal Act, is an additional answer to the argument of the learned Public Prosecutor based upon *Veeraraghavalu* v. *President, Corporation of Madras*[2]. The principle was followed by Devadoss, J., in *Chairman, Municipal Council, Chidambaram* v. *Tirunarayana Aiyangar*[3], which arose out of a prosecution under section 338 of the District Municipalities Act. The principle was there extended to an act which was *ultra vires* a statutory body, and with reference to such act when a person is prosecuted, it was held that it was open to him to raise the contention, and the Court was not prevented from considering the legality of the order. In the same volume at page 866 is another decision to the same effect of Phillips and Madhavan Nair, JJ., which was given in a case arising under the Local Boards Act. The next was the case in *Raheem Sahib*, In re[4], under section 221 of the Local Boards Act decided by Waller and Krishnan Pandalai, JJ., where also the same view was taken. Dealing with all these cases Pandrang Rao and Venkataramana Rao, JJ., in *Ramaswami Aiyangar* v. *Sivakasi Municipality*[5], said in a case that arose under the District Municipalities Act under analogous provisions that the finality mentioned in the rule was only for the purpose of the Act and that the said finality would not prevent a person from impugning the legality or validity of the assessment in a Civil Court, and turning to the position with regard to a criminal prosecution the learned Judges said this :

"Ordinarily where a person is prosecuted for any criminal offence it is incumbent upon the prosecution to affirmatively prove that an offence has been committed and if *prima facie* proof has been let in by the prosecution, it is open to the accused to plead and prove that he has not committed any offence. The fact that the prosecution has been launched under the provisions of a special Act would not displace this elementary rule unless there are provisions in the said Act to the contrary."

Referring to section 354, which corresponds to section 228 of the Local Boards Act they observed :

"So far as the right of the Municipality to levy any tax is concerned, they must strictly conform to the provisions of the Act. If they do not do so, they have no right to enforce the tax. In fact section 354 says that a charge can be validly imposed if the provisions of the Act are substantially complied with. If not there is no jurisdiction to levy it. The imposition of a tax on a person not taxable under the Act would be a substantial disregard of the provisions of the Act and in a suit for refund of the tax it is open to a person to prove that he is not taxable under the Act. We do not see why a different principle should apply in the case of a criminal prosecution and how a person can be convicted of a criminal offence for non-payment of a sum which he is not legally liable to pay. If Mr. Sitarama Rao's argument is to be pushed to its logical conclusion, it comes to this, that when once the municipality imposes an assessment it becomes final ; the assessee must pay the tax and then

1. (1923) 45 M.L.J. 731.
2. (1910) 20 M.L.J. 773 : I.L.R. 34 Mad. 190.
3. (1927) 55 M.L.J. 566 : I.L.R. 51 Mad. 876.
4. (1929) 57 M.L.J. 317 : I.L.R. 52 Mad. 714.
5. (1937) 1 M.L.J. 274.

go to a Civil Court and in the meanwhile if he is prosecuted criminally he must undergo punishment even though ultimately the Civil Court may give him redress. It will be a sorry state of affairs if such were to be the state of the law."

From the survey of the case-law bearing upon the question there cannot be the slightest doubt as regards the position that where the legality of the assessment is questioned or where it is contended that the assessee is not taxable at all, then the assessment that is imposed upon him has no legal existence and it would be open to him in a civil suit to question the legality of the assessment notwithstanding rule 31 for the reason that under section 228 the condition precedent is substantial compliance with the provisions of the Act and that requirement has not been satisfied. *A fortiori* would such a right be available to an accused person in a criminal prosecution not only for the reasons mentioned but for the additional reason mentioned in the decisions I have cited above, namely, that it is for the prosecution affirmatively to prove that the accused is lawfully bound to pay the tax. In the present case, apart from the general contentions, there is the further fact which has been found by the trial Court that notices were not duly served on the accused, and that would furnish an added reason to hold that there was no substantial compliance with the provisions of the Act so as to bar a prosecution in a Criminal Court in respect of the said tax. The appeal is dismissed.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Mrs. Grisilda Titus .. *Petitioner**

v.

Mr. Louis Titus .. *Respondent.*

Criminal Procedure Code (V of 1898), section 489—Application under—Duty of Court is only to consider whether order under section 488 should be cancelled or varied as a consequence of the decision of the Civil Court—Scope of the discretion given by sub-section (2) of section 489.

On an application being filed under section 489, Criminal Procedure Code, it is the duty of the Court to consider whether a decision of the Civil Court leads to the consequence that the order passed by the Criminal Court under section 488 should be cancelled or varied. There is no question of the magistrate considering whether the decision of the Civil Court has altered the circumstances of the case. For the purpose of section 489 (2) the Criminal Court should take the decision as it stands and consider the necessary effect of it upon the order passed by the Criminal Court under section 488. If the consequence is that it should be varied or cancelled, effect must be given to it by cancelling the order or varying it accordingly. The discretion that is given in sub-section (2) of section 489 is only for this limited purpose.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Joint Magistrate, Coonoor, dated 29th March, 1946, in M.C. No. 11 of 1946.

C. S. Swaminathan for Petitioner.

V. T. Rangaswami Aiyangar for Respondent.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the Crown.

The Court made the following

ORDER.—The Joint Magistrate has completely ignored in this case the provisions of section 489 (2) of the Code of Criminal Procedure. On an application filed under this section it is the duty of the Court to consider whether a decision of the Civil Court leads to the consequence that the order passed by the Criminal Court under section 488 should be cancelled or varied. There is no question of his considering whether the decision of the Civil Court has altered the circumstances of the case as the Magistrate has found. For the purpose of section 489 (2) the Criminal Court should take the decision as it stands and consider the necessary

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*Crl.R.C. No. 705 of 1946.
(Crl.R.P. No. 674 of 1946). 12th March, 1947.

effect of it upon the order passed by the Criminal Court. If the consequence is that it should be varied or cancelled, effect must be given to it by cancelling the order or varying it accordingly. The discretion that is given in that sub-section to the Criminal Court is only for this limited purpose. In this case the Magistrate has taken upon himself to completely ignore the decision of the Civil Court and has not chosen to consider whether in consequence of that decision his order should be cancelled or varied. That he was not competent to do.

The learned District Judge has found that the alleged adultery of the wife with Alphonso was not proved to be true by any cogent or reliable evidence and consequently he dismissed the suit that had been brought by the husband impleading her and the said Alphonso as the co-respondent. The only consequence of this decision is that the order passed by the Magistrate in M.C. No. 32 of 1944 cancelling the maintenance allowance that had been granted to the petitioner in the prior proceedings in M.C. Nos. 13 of 1943 and 17 of 1944 should have no effect and the prior orders granting her maintenance should be restored.

The petition is allowed and the maintenance granted to the petitioner in M.C. Nos. 13 of 1943 and 17 of 1944 will be restored. The restoration will take effect as from the date when she filed M.C. No. 11 of 1946 in the Court of the Joint Magistrate, Coonoor, having regard to the principle contained in the proviso to section 488 (3) of the Code of Criminal Procedure.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Guruswamy Mudaliar .. *Appellant**

v.

Ayyanar Thevar and others .. *Respondents.*

Hindu Law—Father's debts—Mortgage by father to secure antecedent debt—Failure to discharge—Sale of properties covered by mortgage—No reservation of sons' rights either in the mortgage or sale—Sons' interests also passed in the sale.

In a suit for partition, the first defendant was the father of the plaintiffs with whom he was joint. He was indebted to the second defendant, a Co-operative Bank and mortgaged the family properties as security therefor. He having failed to discharge the mortgage, the second defendant obtained an award, brought the properties covered by the mortgage to sale at which the second defendant purchased them and subsequently sold them to the third defendant. On the question whether only the father's interest in the property passed to the second defendant in the sale held in execution of the award,

Held, the plaintiffs could only succeed by showing that the mortgage was not binding on them in law, which they could not do as there was an antecedent debt. Further, as the deed of mortgage contained no reservation and purported to convey the full rights of the mortgagor in specified family properties which included the right of mortgaging the sons' interests, the sale covered all properties mortgaged including the interests of the sons.

Appeal under clause 15 of the Letters Patent against the judgment of Somayya, J., dated 23rd April, 1946 and passed in S.A. No. 469 of 1945 preferred to the High Court against the decree of the Court of the Subordinate Judge, Ramnad at Madura, in A.S. No. 59 of 1944 (O.S. No. 114 of 1943, District Munsiff Court, Srivilliputtur).

C. Natarajan for Appellant.

The Advocate-General (*K. Rajah Aiyar*) and *K. Veeraswami* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal raises a question of Hindu Law. It is from a judgment of Somayya, J., under clause 15 of the Letters Patent. The learned Judge considered that the judgment of this Bench in *Satyanarayanappa* v. *Rahimatullah*[1], decided the question. We cannot subscribe to that opinion, but we are otherwise in agreement with the learned Judge.

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*L.P.A. No. 89 of 1946. 21st January, 1947.

1. (1943) 1 M.L.J. 287.

The appeal arises out of a suit for partition instituted in the Court of the District Munsiff of Srivilliputtur by the appellant and his elder brother, who is now dead. There were five defendants, but it is only necessary to refer to the first three. The first defendant was the father of the plaintiffs, with whom he is joint, the second defendant was the Rajapalayam Co-operative Urban Bank, Ltd., and the third defendant was the purchaser from the second defendant of the properties now in suit. The first defendant was a member of the Rajapalayam Co-operative Urban Bank, Ltd., and was indebted to it. As security for his indebtedness he mortgaged family properties to the second defendant. The debt was an antecedent debt and therefore binding on the sons. The first defendant failed to discharge the mortgage and consequently the second defendant took steps to enforce it under the provisions of the Madras Co-operative Societies Act, 1932. In due course the second defendant obtained an award and brought the properties covered by the mortgage to sale. At the auction the second defendant purchased the properties and subsequently sold them to the third defendant.

The plaintiffs alleged that only their father's interest in the properties had passed to the second defendant at the sale held in execution of the award. The District Munsiff held that the interests of the sons as well as the interest of the father had passed, but on appeal the Subordinate Judge of Ramnad disagreed and allowed the plaintiffs' claim for partition on the basis that their interests remained unaffected. The third defendant appealed to this Court and Somayya, J., restored the decree of the District Munsiff. The plaintiffs have now appealed with leave. The question which the Court is called upon to decide is whether the interests of the sons in the mortgaged properties are now vested in the third defendant.

In *Satyanarayanappa* v. *Rahimatullah*[1], this Bench held that where only some members of a Hindu joint family are members of a co-operative society and the family as such is not a member, section 51 of the Madras Co-operative Societies Act does not prevent a coparcener who is not a member of the society from instituting a suit for a declaration that a sale held in execution of an award obtained by a society has not passed his interest in the property to the purchaser. Such a suit had been dismissed *in limine* on the ground that it did not lie. We held that it did lie and remanded the case to the Original Court to be tried on the merits. In doing so we pointed out that at the hearing the pious obligation rule might have bearing as against the sons of the mortgagor, but we went no further than this.

The plaintiffs in the present case could take no part in the proceedings under the Act and did not attempt to do so. Consequently they say that their interests are not affected by anything done in those proceedings. They admit, however, that they are liable on the mortgagee under the pious obligation rule.

What the Courts has to look at is, what was mortgaged and what was sold? The deed of mortgage contained no reservation. It purported to convey to the second defendant the full rights of the mortgagor in specified family properties. As we have already indicated, the mortgage was executed to secure an antecedent debt, and therefore the father had the right of charging his sons' interests as well as his own in the hypotheca. In these circumstances, the deed must be read as conveying to the mortgagee all the rights that the mortgagor possessed and as he possessed the right of mortgaging his sons' interests those interests passed.

Now what was sold? The sale covered all the properties mortgaged and there was no reservation of the interests of the sons. As the interests of the sons had passed to the mortgagee they are bound by the sale. The plaintiffs could only succeed by showing that the mortgage is not binding on them in law and this they cannot do. Admittedly it is binding on them.

The appeal is dismissed with costs in favour of the third defendant.

V.P.S. ——— *Appeal dismissed.*

1. (1943) 1 M.L.J. 287.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction).

PRESENT :—MR. JUSTICE CLARK.

Baggiammal .. *Petitioner**

v.

G. Rajagopala Chetty .. *Respondent.*

Practice—Probate—Application for grant of—Entering of caveat—Objection that caveator had no interest and that caveat should be struck off—If can be disposed of on a Judge's summons or if to be decided in the testamentary suit itself—Hindu reversioner—If person interested in the estate to enter caveat—Succession Act (XXXIX of 1925), *section* 295 *and O.S. Rules, Order XXXIV, rules* 50 *and* 62.

A question whether a caveator has an interest in the estate to lodge the caveat and contest the grant of probate of a will can be disposed of on a Judge's summons and need not be decided only in the testamentary suit. A summons for discontinuance of proceedings may be taken out where a caveator shows insufficient interest.

A Hindu reversioner of the estate disposed of by a will who disputes the validity of the will has an interest in the estate of the testator and is entitled to lodge the caveat.

The Advocate-General (*K. Rajah Aiyar*) and *M. E. Rajagopalachari* for Petitioner.

C. Narasimhachari and *K. R. Venkatarama Sarma* for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner has applied for a grant of letters of administration with the will annexed to the estate of Gudisai Narayanaswami Chetty, deceased. The respondent has lodged a caveat against that grant. The object of the present summons is to have the respondent's caveat struck off on the ground that the respondent has no interest in the estate of the deceased. The following table will serve to show the relationship of the parties.

Ramu Chetty (deceased)

Govinda Chetty (deceased)	Venkatesa Chetty (deceased)
Peria Muniswami Chetty (deceased)	Chinna Muniswami Chetty (deceased)
G. Narayanaswami Chetty (deceased) : Baggiammal (petitioner) (legatee)	G. Rajagopala Chetty (respondent).
Kannammal (daughter) : Appadorai	
Pratapan.	

It is common ground that the deceased and the respondent were members of a joint and undivided Hindu family ; but according to the petitioner, there was a partition in status on the 7th June, 1945. The will which is dated the 14th June, 1945, is on the footing of that partition and is a disposition by the deceased of his share in the family properties. It is alleged that the deceased died on the 21st January, 1946.

In her petition for the grant, the petitioner included the respondent as one of the relatives of the deceased and accordingly citation was issued to him. In response he filed a caveat and later a written statement of his defence. The ground of the respondent's caveat shortly stated is that the deceased was not in a sound and disposing state of mind in June, 1945, when he is said to have made the will. He was then about seventy years of age and it is alleged had suffered a paralytic stroke. In consequence of this stroke and of his great age it is said that he was thereafter affected both in body and mind. According to the affidavit in support of the caveat and the written statement of defence, the respondent on this ground disputed the validity both of the will and of the alleged partition.

*Application No. 2189 of 1946 in T.O.S. No. 9 of 1946. 16th December, 1946.

The petitioner has filed a suit (C.S. No. 129 of 1946) in this Court against the respondent and his sons for partition of the family property by metes and bounds. The petitioner's daughter and grandson are also parties to this suit which is now pending.

The petitioner's contention on the present summons is that the respondent has no interest in the estate of the deceased and accordingly was not entitled to file a caveat. On that ground she prays that the caveat may be struck off, the written statement removed from the file and that she may be permitted to prove the will in common form.

The answer of the respondent is twofold. First he contends that such a summons does not lie and secondly he claims to have an interest in the estate of the deceased as a reversioner.

The first point taken is purely procedural and is based on section 295 of the Succession Act which provides that contentious cases are to take, as nearly as may be, the form of a regular suit. Now in accordance with the usual practice, on the lodging of the caveat the petition and the caveat were registered and numbered as a suit and a written statement was filed by the respondent. Necessarily, however, those pleadings do not deal with the question of the right of the caveator to lodge the caveat, for a caveator is not required to state his interest in the estate of the deceased in his written statement. According to Order XXXIV, rule 50 of the Original Side Rules that must be stated in the affidavit filed in support of the caveat. In the present case there was no express statement in that affidavit of the interest relied on by the respondent ; but that omission, it seems to me, may well be due to the fact that citation was issued to the caveator which no doubt led him to suppose that he was regarded as necessary party to the proceedings. Be that as it may, the respondent's contention is that the decision of this question is one which can properly be dealt with only in the suit and not as is attempted here, on a Judge's summons in separate proceedings. I cannot accept that contention. As I have said, the point would not ordinarily arise on the petition and written statement, the pleadings in the "suit", and it is I think, on that account that in similar proceedings in the High Court of Justice in England such a matter is dealt with by summons. The circumstances in which a summons for discontinuance of proceedings may be taken out are set out at page 378 of the 18th Edition of Tristram and Coote's Probate Practice. It is there stated that apart from the case of the taking out of such a summons by consent, it may be taken out, " where a caveator enters an appearance to a warning showing insufficient interest". It appears that in the English procedure the " warning " refers to the notice to appear issued against the caveator by the party whose application for a grant has been stopped and accordingly the case now before me would appear to have reached the point at which according to the English procedure a summons for discontinuance of proceedings would be the proper procedure to be taken by a petitioner who desired to establish that the caveator had insufficient interest to justify his lodging of the caveat. Order XXXIV, rule 62 of the Original Side Rules provides that the practice and procedure of the Probate Division of the High Court of Justice in England shall be followed in this Court so far as they are applicable and not inconsistent with the terms of Order XXXV, the Succession Act and the Code of Civil Procedure. Thus, I am bound to follow the practice followed in the English Courts unless there is any other practice laid down. It seems to me that the only way in which this matter could be dealt with in the suit itself would be for the petitioner to apply for leave to file a reply in which she could include her present contention. There would then be room for raising an issue on the point. That however seems to me to be a somewhat cumbersome procedure when there is the established practice in the English Courts of disposing of the matter by summons. Accordingly I hold that the procedure now adopted is proper.

The second point taken by the respondent is the substantial issue. He claims to be entitled to lodge a caveat by reason of his interest in the estate of the deceased as a reversioner. Now the petitioner's first objection to this plea is that it was not raised in either the affidavit in support of the caveat or in the written statement

and she urges that it cannot now be raised for the first time on the summons. As I have said, the main ground of the caveat is that the will is invalid by reason of the fact that the testator was not in sound disposing mind at the time when he is alleged to have executed it. The partition in status relied on by the petitioner is alleged to have been effected at about the same time and the respondent urges that both are invalid by reason of the mental incapacity of the testator. Consequently, with this plea the defence of the respondent proceeds to aver that as there was no partition, the property which it is alleged the testator disposed of by the will passed to the respondent by survivorship and accordingly that the testator did not die possessed of any properties and that on that ground his will must necessarily be inoperative. Now it is conceded by counsel on behalf of the respondent that the denial by him of the interest of the testator in the properties cannot entitle him to file a caveat. It is of course a denial of the title of the testator and no person denying the testator's title can on that account alone be entitled to lodge a caveat. But in my view this does not dispose of the matter for if it is held contrary to the respondent's main contention, that there was a valid partition in status, the respondent would be entitled as a reversioner in the event of its being held that the will now sought to be proved was invalid. Thus in that event the respondent clearly has an interest in the estate of the deceased. Counsel for the petitioner has urged that to take this view of the matter involves allowing the respondent to raise two entirely inconsistent pleas. I cannot accept that contention. There would in my view be no impropriety in the respondent pleading that he was entitled to the whole estate as survivor of the joint undivided Hindu family, and in the alternative, that if a partition was held to have taken place he was entitled as a reversioner. If it is held in the suit now pending that there was a valid partition, the respondent will necessarily become a reversioner and could only be displaced in that right by the acceptance as valid of the will now put forward.

It is not disputed that the respondent is a reversioner though not the presumptive reversioner and as was held in *Jammi Hanumantha Rao* v. *Aratla Letchamma*[1],

> "It has been consistently held that a reversioner is entitled to oppose the grant of probate."

The correctness of the decision in that case was doubted in *M. K. Sowbagiammal* v. *Komalangi Ammal*[2]. But those doubts were not on this point. In *M. K. Sowbagiammal* v. *Komalangi Ammal*[2], Venkatasubba Rao, J., stated the test of interest as follows:

> "The test is, does the grant displace any right to which the caveator would otherwise be entitled. If so he has such an interest, if not he has not."

Now applying this test to the present case it seems to me clear that if a grant is made in favour of the petitioner it necessarily follows that the respondent's right as a reversioner will be displaced. Of course that right will not arise if the alleged partition is not established; but it seems that that is a consideration of no importance in the present case which is one to establish the validity of the will and which proceeds on the footing that there was a partition. To put it in another way, it is the petitioner's case that the testator died possessed of an undivided half share in what were formerly joint family properties. If her case on that footing is established, then the respondent clearly has a right to be present when the will which will operate to displace his right as a reversioner is probated.

Accordingly I hold that the respondent has an interest in the estate of the deceased and was entitled to lodge the caveat. In the circumstances of this case and as it is the respondent's contention that both the will and the partition are invalid by reason of the testator's incapacity in or about June, 1945, it seems to me that the testamentary suit will be most conveniently dealt with along with the partition suit, C.S. No. 129 of 1946, and the parties agree that this would be the most suitable procedure to adopt. Accordingly I direct T.O.S. No. 9 of 1946 to be heard along with C.S. No. 129 of 1946.

The costs of this summons will be costs in the cause in T.O.S. No. 9 of 1946.

K.S. ——— *Ordered.*

1. (1926) 51 M.L.J. 563 : I.L.R. 49 Mad. 960 at 963.
2. (1928) 54 M.L.J. 382 (on appeal I.L.R. 54 Mad. 24 : 59 M.L.J. 529.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

The Public Prosecutor .. *Appellant**

v.

Kodali Arjuna Rao and another .. *Respondents.*

Madras Prevention of Adulteration Act (III of 1918), section 5 (2) and rules 27 and 29—Applicability—Possession of adulterated milk—Presumption that it was for sale—When arises—Mere possession for another—If offence.

In order that a presumption may be drawn under sub-section (2) of section 5 of the Madras Prevention of Adulteration Act that any food found in the possession of a person was kept by such person for sale, it must first be established that he was in the habit of storing like articles for sale. That provision can have no application where the case is that the accused was entrusted with a pail of milk (which was found to be adulterated) to be delivered at the same hotel to which the accused was taking his own milk. It cannot be said that the accused was the vendor or in possession of the milk for the purpose of sale. Accordingly the accused cannot be found guilty of having contravened the provisions of the Madras Prevention of Adulteration Act or rules 27 and 29 framed under that Act.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents (accused 1 and 2) by the Sub-Divisional Magistrate of Gudivada in C.C. No. 27 of 1946 on his file.

The Public Prosecutor (*V. L. Ethiraj*) in person.

Respondents not represented.

The Court delivered the following

JUDGMENT.—This is an appeal by the Crown from the acquittal of the respondents in C.C. No. 27 of 1946 on the file of the Sub-Divisional Magistrate, Gudivada. The case was first tried by the Stationary Sub-Magistrate, Gudivada and he subsequently forwarded it under section 349 (1), Criminal Procedure Code, to the Sub-Divisional First Class Magistrate, Gudivada, for disposal as he was of the opinion that since the second respondent was a child within the meaning of the Madras Children Act, his case called for a different punishment from that which he was empowered to inflict. The Sub-Divisional Magistrate on a review of the evidence came to the conclusion that no case had been made out against either of the respondents and he accordingly acquitted both of them.

The charge sheet in the case was filed by the executive authority of the Gudivada Municipality and the respondents were alleged to have committed offences under rules 27 and 29 of the rules framed under section 20 of the Madras Prevention of Adulteration Act and also under section 109 read with section 138 of the Public Health Act. They were stated to have been responsible for the adulteration of milk and for the sale of the adulterated milk and in the charge sheet it was further alleged that the first accused being the owner who offered for sale adulterated milk and the second accused being in possession of adulterated milk for sale were both liable for conviction. The milk was seized while it was being delivered by the second accused at the coffee hotel of P.W. 1 by the Municipal Sanitary Inspector P.W. 2 who after complying with the provisions of the Act took samples and sent them to the Government Analyst. The Government Analyst was of opinion that the milk seized from the second accused contained 51 per cent. of added water. The learned Sub-Divisional Magistrate on a careful scrutiny of the evidence came to the conclusion that the first accused was not proved to have had anything to do with the milk or the transaction in it and as regards the second accused he was of the opinion that it was not proved by the prosecution that he was offering any milk for sale. He found that there was not the slightest indication that he added water to the milk that was tested or that he even knew of the addition of water to the milk by the person who handed over the milk vessel. The case of the first accused was that he had nothing to do with the milk and that the second accused was not his servant at all. The second accused pleaded in his statement that he

*Crl.A. No. 710 of 1946. 4th March, 1947.

was employed under one Somayya thereby meaning that he was not the employee of the first accused. He stated that when he was going to Gudivada taking his master's milk to be supplied to their regular constituents he was asked on the way by the first accused's wife to take some milk and give it in P.W. 1's hotel and that he complied with that request. The milk that was seized from him by P.W. 2 was not his master Somayya's milk but the milk that was given to him on the way by the wife of the first accused.

Upon the facts there is little doubt that adulterated milk was recovered from the 2nd respondent but it is equally clear from the evidence that the 2nd respondent was not having the milk in his possession for sale nor was the milk proved to have been adulterated by him. Further it has not been proved that the first accused who was not the master of the second accused had any knowledge whatever of the transaction. I am therefore in entire agreement with the findings of fact arrived at by the learned Sub-Divisional Magistrate. Since however some legal contentions have been raised by the learned Public Prosecutor it is necessary to set out the relevant provisions.

Section 5 (1) (*a*) of the Madras Prevention of Adulteration Act provides that every person who sells any food which is not of the nature, substance or quality of the article demanded by the purchaser shall be punishable with fine extending to Rs. 100 for the first offence and with higher fines for subsequent offences. Section 20 of the Act empowers the Local Government to make rules generally to carry out the purposes of the Act and in particular *inter alia* to prescribe standards of purity for milk, etc., and also to prohibit in the interests of public health the addition of water or other diluent or adulterant to any food. In exercise of these powers rule 27 was, among other rules, enacted which provides that no person shall add any water or any skimmed or separated milk to milk intended for sale and that no person shall either by himself or by any servant or agent sell or offer or expose for sale and no person shall have in his possession for the purpose of sale any milk to which any such addition has been made. Rule 29 provides that whoever commits a breach of any of the rules shall be punished with (*a*) in the case of a first conviction with fine which may extend to Rs. 100 and (*b*) in the case of a subsequent conviction with fine which may extend to Rs. 500. It is not necessary for the purpose of this case to set out the provisions of the Public Health Act.

The charge sheet, as I have already stated, proceeded on the footing that the first accused being the owner, offered for sale adulterated milk. There is no foundation whatever in the evidence for holding that he had any knowledge of the transaction or of the adulteration of the milk ; much less is there anything to show that he offered for sale the adulterated milk. The only record we have of anything implicating the first accused is the statement of the second accused in which he mentioned that on his way to the hotel when he was carrying his master's milk the wife of the first accused entrusted to him a pail of milk to be delivered at the same hotel. But that statement has not been substantiated and the learned Sub-Divisional Magistrate was right in finding that there are several circumstances casting a doubt upon the truth of that statement. It must therefore be found that there is no legal evidence of any kind connecting the first accused with the adulteration or sale of the milk.

Coming to the second accused the case was that he was in possession of the adulterated milk for the purpose of sale. This expression is used in the charge sheet in view of the language of rule 27 which says that no person shall have in his possession for the purpose of sale any milk to which water has been added. I have already found that the second accused was not in possession of the adulterated milk for the purpose of sale. The further question that has to be considered is whether mere possession of adulterated milk constitutes by itself an offence within the meaning of rule 27 and whether there is scope for an inference from the mere *factum* of possession that such possession was for the purpose of sale. The learned Public Prosecutor invites my attention to sub-section (2) of section 5 of the Madras Prevention of Adulteration Act which lays down that in every prosecution for an offence under this

section, the Court may presume that any food found in the possession of a person who is in the habit of manufacturing or storing like articles for sale has been manufactured or stored by such person for sale. In order that any such presumption might be drawn against the second respondent it must first be established that he was in the habit of manufacturing or storing like articles for sale. That is not the prosecution case against the second accused and consequently this provision can conceivably have no application to the second accused. No other provision in the Act or in the rules has been brought to my notice under which an inference can be drawn that such possession was for the purpose of sale. Section 6 (1) merely says that the plea of ignorance by the vendor as to the nature, substance or quality of the food sold by him is no defence to a prosecution for an offence under section 5. There is no case at least so far as the milk involved in this case goes that the second accused was the vendor.

A decision of Byers, J., in C.A. No. 392 of 1944 of this Court (unreported) has also been brought to my notice by the learned Public Prosecutor. I do not think it necessary to refer to the facts of that case as they are entirely different from the facts of the present case. There the learned Judge pointed out that milk was being carried by the accused every day for being sold to a shop keeper and that the shop-keeper was purchasing the milk from the accused every day.

For the foregoing reasons, I agree with the learned Sub-Divisional Magistrate that neither the first accused nor the second accused is guilty of having contravened the provisions of the Madras Prevention of Adulteration Act or rules 27 and 29 framed under that Act. The appeal is accordingly dismissed.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Pavayamal and another .. *Appellants**

v.

Samiappa Goundan and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 39—Applicability—Conditions—Suit for maintenance by wife and daughter of X—Decree—Payment, if could be made a charge on immoveable properties in the hands of transferees from X.

In a suit by the wife and daughter of *X* for maintenance, on a question whether the payment of the amount decreed could be made a charge on the immoveable properties in the hands of transferees from *X*,

Held : It could not be said of the plaintiffs that they have got a right to receive maintenance "from the profits of immoveable property" of *X* when only section 39 of the Transfer of Property Act will come into play. Further mere knowledge of the legal right would not be enough as, if it were so, there could be no sale by the husband of his properties to third parties without the risk of the wife turning up later and saying that they had notice of her right and that therefore the transferees were bound to recognize her right. What the section contemplates is a claim based on the right to receive maintenance and notice of such claim, without both of which there can be no charge on properties in the hands of transferees.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in A.S. No. 130 of 1944 preferred against the decree of the Court of the District Munsiff, Erode, in O.S. No. 62 of 1943.

S. T. Srinivasagopalachari for Appellants.

S. Ramaswami Aiyangar for Respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs who are the wife and the daughter respectively of the first defendant filed the suit for maintenance. Defendants 2 and 3 are the alienees from the first defendant of properties belonging to him. The District Munsiff decreed maintenance to the plaintiffs and made the payment a charge on

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*S.A. No. 2091 of 1945. 12th March, 1947.

the properties alienated by the first defendant to defendants 2 and 3 under Ex. D-2. On appeal by defendants 2 and 3 the Subordinate Judge has negatived the charge holding that section 39 of the Transfer of Property Act does not apply because there was no evidence worth the name about the second and third defendants having knowledge of the claim for maintenance by the plaintiffs.

In the first place, it cannot be said of the plaintiffs that they have got a right to receive maintenance "from the profits of immoveable property" when only section 39 will come into play. Secondly, mere knowledge of the legal right would not appear to be enough as, if it were so, there could be no sale by a husband of his properties to third parties without the risk of the wife turning up later and saying that they had notice of her right and that therefore the transferees were bound to recognise her right. What the section contemplates is a claim based on the right to receive maintenance and notice of such claim.

Moreover, in this case both Courts have found that the suit is the result of collusion between the husband and the wife. In fact, the Subordinate Judge says that he accepted the evidence of the second defendant.

The daughter stands on no better footing than the wife. She has got a claim for maintenance only up to the date of her marriage and not longer.

The second appeal is dismissed with costs. No leave.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

K. R. Balaji Rao and others .. *Petitioners**

v.

M. G. Natesa Chetty .. *Respondent.*

Civil Procedure Code (V of 1908), section 151—Inherent jurisdiction of High Court to stay independent suit—Conditions necessary for.

It cannot be said that the High Court has no jurisdiction under section 151, Civil Procedure Code, to stay the trial of a suit out of which the proceedings in the High Court do not arise. The only limitation that can be placed upon the exercise of such jurisdiction would be that the applicant for stay has no other remedy available to him in law which he can seek from a competent Civil Court. For instance, if he can get the particular suit stayed under section 10 of the Civil Procedure Code, it would be necessary for him to adopt that remedy and where he has failed to do this, the High Court would not in exercise of its inherent jurisdiction direct the stay of the suit under section 151 of the Civil Procedure Code. It should further be established to the satisfaction of the High Court for invoking its inherent jurisdiction that the stay has to be ordered in the ends of justice or to prevent abuse of the process of the Court. If these conditions are satisfied, there can be no question that the trial of an independent suit can be stayed by the High Court in exercise of its inherent powers under section 151, Civil Procedure Code, in the course of other proceedings pending before it.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing the stay of the trial of the suit in O.S. No. 388 of 1943, District Munsiff Court, Dharmapuri, pending A.A.O. No. 517 of 1946 presented to the High Court against the order of the Court of the Subordinate Judge, Salem, dated 14th December, 1945 in E.A. No. 474 of 1944 in E.P. No. 12 of 1941 in O.S. No. 41 of 1929.

C. S. Swaminathan for Petitioners.

A. Bhujanga Rao for Respondent.

The Court made the following

ORDER.—This is an application under section 151 of the Code of Civil Procedure to stay the trial of O.S. No. 388 of 1943 on the file of the District Munsiff's Court of Dharmapuri pending the disposal of C.M. A. No. 517 of 1946 in this Court.

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*C.M.P. No. 664 of 1947. 25th March, 1947.

On behalf of the respondent, an objection has been raised *in limine* that the application is not maintainable as section 151 of the Code of Civil Procedure is not applicable and this Court has no jurisdiction to stay the trial of a suit out of which the proceeding in this Court does not arise. This contention has been negatived in a series of decisions of various High Courts—vide *Ankalu Reddi* v. *Chinna Ankalu Reddi*[1], *Hukumchand Boid* v. *Kamalanand Singh*[2], *Nandakishore* v. *Ram Golam Sahu*[3], *Mulchand* v. *Jiwandas*[4], *Ma Kyaw* v. *Daw Kye*[5], anl *Makhanlal Chaudury* v. *Chandinath Majumdar*[6]. The only limitation that can be placed upon the exercise of jurisdiction would be that the applicant for stay has no other remedy available to him in law which he can seek from a competent Civil Court. For instance, if he can get the particular suit stayed under section 10 of the Code of Civil Procedure, it would be necessary for him to adopt that remedy and where he has failed to do this this Court would not, in exercise of its inherent jurisdiction, direct the stay of the suit under section 151 of the Code of Civil Procedure. It should further be established to the satisfaction of this Court for invoking its inherent jurisdiction that the stay has to be ordered in the ends of justice or to prevent abuse of the process of the Court. If these conditions are satisfied, there can be no question that the trial of an independent suit can be stayed by this Court in the exercise of its inherent powers under section 151 of the Code of Civil Procedure in the course of other proceedings pending before it. The preliminary objection must be overruled. There is no other contention raised on behalf of the respondent. The suit whose stay has been asked is the earlier suit which cannot be possibly stayed under section 10 of the Code of Civil Procedure, and on the merits I am satisfied that it is in the ends of justice to direct stay of trial of that suit. The petition is allowed.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

T. C. Kandaswamy Chettiar .. *Petitioner.**

Madras Rice Mills Licensing Order (1943), *clause 2—Hulling of paddy before granting of licence applied for— If an offence—Obscurity in enactment—Benefit to go to accused.*

On the 2nd March, 1945, the petitioner applied for a licence in Form I, Madras Rice Mills Licensing Order, 1943, in which occurs the clause "I declare that I have in my possession the following stock of rice which has been processed otherwise than by the processes described in paragraph 4 of the Form of Licence (Form II) and I agree not to mill rice except by those processes in future from the date of this application." He was charged with having hulled paddy in his rice mill without a licence on the 11th March, by which date no orders had been passed on his application.

Held, having regard to the terms of Form I of the schedule it must have been the intention that when an application for licence is made and in the ordinary course it is granted such a licence must be deemed to be valid and in operation from the date of the application. Though there is no express provision for such a result it can be inferred by necessary intendment. Though the petitioner cannot mill rice without licence under clause 2, the benefit of the obscurity in the wording in Form I which is a part of the Act should be given to him.

Wardale v. Binns, (1946) 2 All. E.R. 100, Followed.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of Coimbatore division, dated 29th January, 1946 and passed in C.A. No. 208 of 1945 (C.C. No. 203 of 1945, Additional First Class Magistrate of Erode).

N. Somasundaram and *P. S. Kailasam* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

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1. (1943) 2 M.L.J. 557.
2. (1905) I.L.R. 33 Cal. 927.
3. (1912) I.L.R. 40 Cal. 955.
4. A.I.R. 1933 Lah. 50.
5. A.I.R. 1935 Rang. 355.
6. A.I.R. 1931 Cal. 779.

*Crl. R.C. No. 702 of 1946. (Crl.R.P. No. 671 of 1946). 14th March, 1947.

The Court made the following

ORDER.—This appears to be a case which, in the words of Singleton J., in a recent case in the King's Bench Division, "is very much easier to argue than one in which to give judgment."

The petitioner was convicted under rule 81 (4) of the Defence of India Rules read with clause 2 of the Madras Rice Mills Licensing Order, 1943, and sentenced to one month's rigorous imprisonment and a fine of Rs. 150. On appeal to the Sessions Judge the conviction was confirmed, but the sentence of imprisonment was reduced to the period already served and the sentence of fine was upheld. The petitioner seeks to revise the said decision of the Sessions Judge.

The offence with which he was charged was that he hulled paddy in his rice mill without a licence in contravention of clause 2 of the Madras Rice Mills Licensing Order, 1943. Under clause 2 of that order, on and after the date from which that order came into force no person shall carry on the business of milling rice by power-driven machinery except under and in accordance with the conditions of a licence issued in that behalf by the Collector of the District. Clause 3 provides that applications for licence under the order shall be made in Form I in the schedule to that order to the Collector of the District; and under clause 4, the licences issued under the order shall be in Form II in the schedule to the order. Form I is certainly peculiar. In addition to the particulars of the applicant's name, address and place of situation of the mill, there is a provision for a declaration that the applicant is the proprietor or manager of the rice mill covered by the application. Then occur the following provisions:

"I have carefully read the Madras Rice Mills Licensing Order, 1943, and the conditions of licence in Form II in the schedule to the said order and I agree to abide by them.

I declare that I have in my possession the following stock of rice which has been processed otherwise than by the processes described in paragraph 4 of the Form of Licence (Form II) and I agree not to mill rice except by these processes in future from the date of this application."

It has been found that the petitioner applied for a licence under the provisions of this Order on the 2nd March, 1945. He was charged with having hulled paddy in his rice mill without a licence on the 11th March, 1945, *i.e.*, after the date of his application. By that date no order had been passed on his application for a licence.

The learned Sessions Judge says that the object of the order was to see that in machines of the single huller type rice shall be passed through the huller only once. There was no evidence in the case that the petitioner was passing paddy through the huller more than once.

The question is whether in these circumstances the petitioner was rightly convicted under the order. From the preamble to the order it appears that it was found necessary for maintaining supplies of rice essential to the life of the community, to regulate the treatment of paddy in rice mills in the Province of Madras. Form I must be taken to have been embodied in the order itself because of clause 3 which says that applications for licence shall be in that form. In his application in accordance with that form the applicant has to agree not to mill rice except by the processes described in paragraph 4 of the form of licence to be granted in future from the date of the application. The learned advocate for the petitioner relies upon this last provision, that is to say, the provision that the applicant agrees not to mill rice except by certain processes indicated in the licence to be granted, from the date of the application and not from the date of the grant of the licence. It is true that under clause 2 of the order no person can carry on the business of milling rice by power-driven machinery except under a licence issued in that behalf by the Collector of the District. Obviously on the date of the application for the licence the applicant cannot be expected to have a licence in his favour. In fact he is asking for one. Therefore it would appear that even though he has made an application, he cannot carry on the business of milling rice even after that date till a licence is granted to him. The provision therefore that the applicant should agree not to mill rice except by certain processes mentioned in the licence

to be granted in future from the date of the application does not appear easy to understand. Does it mean that if he follows any of the processes so mentioned that he could mill rice from the date of the application? In my opinion there is one way in which this provision may probably be reconciled with the terms of clause 2 of the order and in attempting at this reconciliation I am taking into consideration the object of the order and the possible inconvenience which is likely to result not only to the man who is doing the buisness of rice hulling but to the entire community. It is not unreasonable to suppose that when an application for licence is made and in the ordinary course it is granted, the licence shall be deemed to be in operation from the date of the application. No doubt, in some enactments there is express provision for such a result. But in my opinion such a result can also be inferred by necessary intendment. Having regard to the terms of Form I of the schedule it must have been the intention that when an application for licence is granted in due course such a licence must be deemed to be valid from the date of the application. That is why the applicant is made to agree not to mill rice except by the processes mentioned in the licence to be granted even from the date of the application. With great respect I would in deciding this case respectfully follow the principle laid down in a recent decision of the King's Bench Division in *Wardale* v. *Binns*[1]. Humphreys, J., referred therein to certain observations which fell from Lord Goddard, L.C.J. in the course of the argument in that case. This is what he says:

> "I desire to associate myself heartily with some observations which fell from my lord in the course of the argument when he observed that he was very much averse to the notion that any person should be convicted in this country upon the terms of an Act of Parliament which was obscure and which lawyers could not construe clearly. If an Act of Parliament is so drawn as to make it really difficult to say what was intended and what facts come within it, the benefit of that obscurity should be given to the accused person."

Having regard to the finding that there was no evidence that the petitioner contravened any of the provisions of the licence set out in Form II, I think that he should be given the benefit of this salutary rule. I therefore set aside the conviction and sentence of the petitioner and direct that the fine, if paid, should be refunded to him.

V.P.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

Devadas (minor) and others .. *Petitioners**

v.

Maniyam Sadasiva Reddiar and others .. *Respondents.*

Court-Fees Act (VII of 1870), section 7 (ix)—Suit for redemption of usufructuary mortgage—Prayer for account regarding surplus deficiencies—Separate court-fee if payable.

Where the main relief claimed in the suit is one for redemption of a usufructuary mortgage but the plaintiff prays that the mortgagee should account for surplus deficiencies caused by him during the course of his management of the mortgaged property, the suit is substantially one for redemption and is leviable to court-fee under section 7 (*ix*) of the Court-Fees Act and no separate court-fee is payable on the prayer for account regarding surplus deficiencies.

Granthi Pothanna v. *Satyananda Charyulu*, (1931) 60 M.L.J. 698 and *Radhakrishna Chetti* v. *Teckla Schomberg*, (1940) 2 M.L.J. 867, approved.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the finding of the Court of the Subordinate Judge, Salem, dated 9th January, 1945 in O.S. No. 51 of 1944 and appeal against the decree of the Court of the Subordinate Judge, Salem, dated 14th February, 1945, in O.S. No. 51 of 1944.

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1. (1946) 2 All.E.R. 100.

* C.R.P. No. 521 of 1945 and Appeal No. 434 of 1945. 21st February, 1947.

K. V. Ramachandra Aiyar for Petitioners.

D. Ramaswami Aiyangar, the Government Pleader (*K. Kuttikrishna Menon*) and *P. S. Srinivasa Desikan* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—In this civil revision petition the plaintiff in the suit is the petitioner and he challenges the correctness of the learned Subordinate Judge of Salem in rejecting his suit for redemption of a mortgage on the ground that an insufficient amount of court-fees had been paid. The amount of court-fee which the petitioner had paid was calculated on the amount of the principal of the mortgage debt. The learned Subordinate Judge held that in addition to the amount already paid, Rs. 652-7-0, the petitioner was required to pay about Rs. 150 in respect of a claim which, the learned Judge held, was made for the balance due to him for acts of waste or wrong alleged to be committed by the mortgagee.

A usufructuary mortgage was executed on the 5th May, 1926,by one Vasudeva Reddiar in favour of the first and second defendants and the father of the third defendant in the suit, as mortgagees, to secure a loan of Rs. 9,000 ; some property in a mitta in the District of Salem was security for the mortgage. In regard to that property the mortgagor, Vasudeva Reddiar, was entitled absolutely to a one-half share and, in respect of the other half a perpetual right of enjoyment conditioned upon payment of Rs. 175 per annum as rent ; failure to pay the rent was a ground for forfeiture of that half of the property. In the mortgage deed the mortgagees covenanted to pay the above annual rent. On the 2nd April, 1930, the equity of redemption was transferred to the plaintiff in the suit and, by virtue of that transfer he instituted the suit for redemption. It is convenient hereafter to refer to him as the mortgagor.

The mortgagees failed to pay the annual rent of Rs. 175 and therefore failed to observe their obligation under the mortgage deed, and, as a consequence, one half of the property has been forfeited. The plaintiff alleges that the value of his interest in the lost property, prior to its forfeiture is represented by a sum of Rs. 12,000 and he contends that, Rs. 9,000 of that sum being appropriated towards the mortgage debt, that debt is fully discharged and he is entitled to an order for redemption of the property. Further, he alleges that he is entitled to obtain from the mortgagees the balance of Rs. 3,000 the difference between the value of the lost land and the amount of the mortgage debt.

His assertion regarding the recovery of payment over to him of the balance arises out of section 76 (*c*) of the Transfer of Property Act which provides that when, during the continuance of the mortgage, the mortgagee takes possession of the hypotheca, he must, in the absence of a contract to the contrary, out of the income of the property, pay all rent accruing due in respect of it. The section further provides that if the mortgagee fails to perform any of the duties imposed upon him by the section, he may, when accounts are taken in pursuance of a decree made under the Chapter of the Act in which section 76 is included, be debited with the loss, if any, occasioned by such failure.

It is now convenient to refer to the relevant provision of the Court-Fees Act. That is section 7 (*ix*) which enacts as follows :

"In suits against a mortgagee for the recovery of the property mortgaged . . . . (the amount of fee payable shall be computed) according to the principal money expressed to be secured by the instrument of mortgage."

Notice of the present proceedings was given to the learned Government Pleader since the present question arises under the Court-Fees Act, and, in argument, he contended that the claim by the mortgagor in the suit is not entirely a claim contemplated by section 7 (*ix*), namely, a suit for the recovery of the property mortgaged. Consequently, he contended, that in regard to the assertion by the mortgagor that he is entitled to the Rs. 3,000, the difference above mentioned, that is not

a claim contemplated by clause (*ix*) and must be separately assessed with regard to court-fee.

Several decisions of this Court have been cited which deal with the peculiar law applicable to the Malabar district and to mortgages cum leases of property in that area. In my opinion, those decisions are not in point and in the present instance reference to them is not necessary.

When a mortgagor under a usufructuary mortgage wishes to terminate the existence of the mortgage, he is entitled to institute a suit for redemption. In that suit, upon a decree being passed, the Court, as a rule, in the absence of admission between the parties which make it unnecessary, directs an account or accounts to be taken to ascertain whether the mortgage debt has been discharged or, if not, how much remains, and for what sum, if any, the mortgagee, who has been in possession of the property is obliged to account to the mortgagor in respect of his stewardship, to ascertain any moneys which should be payable or credited to the mortgagor for any acts of waste committed by the mortgagee and, also, in the event of the mortgagee failing to observe his duties set out in section 76 of the Transfer of Property Act, particularly as in this case, relating to his obligation to pay rent, the amount for which the mortgagee should account to the mortgagor. Not infrequently when an account is taken it is found that there are surplus profits derived by the mortgagee from the estate, for which he is bound to account to the mortgagor. When the account has been taken the decree directs redemption. Such decree may also, if the circumstances required, direct that the property shall be reconveyed to the mortgagor conditional upon him paying a specified sum to the mortgagee ; or the decree may provide for the transfer of the property by the mortgagee to the mortgagor and also payment to the mortgagor of some stipulated sum.

The question of the amount of court-fee and the principle on which it should be ascertained in a suit for redemption has been considered on two occasions by single Judges of this Court in suits where the mortgagor was asserting a right to obtain surplus profits, either stipulated sums or sums which would be reflected after accounts had been taken between the parties. These decisions are *Granthi Pothanna* v. *Satyananda Charyulu*[1], and *Radhakrishna Chetti* v. *Teckla Schomberg*[2]. In each of these cases it was held that an additional court-fee was not required ; the provisions of section 7 (*ix*) of the Court-Fees Act regarding a suit for recovery or redemption of mortgaged property included claims or prayers for surplus profits. In the course of his judgment Abdur Rahman, J., in *Radhakrishna Chetti* v. *Teckla Schomberg*[2] observed at page 869 as follows :

> "Since the main relief claimed by the plaintiff is one for redemption and her prayers for surplus profits or for accounts are only subservient to the main relief claimed by her and as the ascertainment of the amount payable by one party to the other is a condition of redemption and is incidental thereto, the valuation put by the plaintiff in her plaint is correct."

The valuation which the plaintiff had put was the amount of the mortgage debt.

I am unable to find any difference in principle between those two decisions and the present case. I would observe that, with respect, I agree with the decisions expressed in both those cases. Since surplus profits which are received by a mortgagee and for which he has to account in a redemption suit are not the subject of a separate valuation, but a redemption suit is subject only to court-fee ascertained by reference to the mortgage debt, I am unable to see why the same principle should not be applicable when, instead of surplus profits, there is, what I will call, surplus deficiencies. The mortgagor in a redemption suit is entitled to claim the return of the mortgaged property. If, as is alleged in the plaint in this suit, the mortgagee has occasioned by his default part of the mortgage property to be lost, then in fact the mortgagor will not recover back that part of the property ; what he seeks to recover is what represents the lost property. Further, since the mortgagee must

1. (1931) 60 M.L.J. 698. 2. (1940) 2 M.L.J. 867.

account for surplus profits and also account in respect of loss which he has caused, surplus profits not being the subject of a separate court-fee assessment, I see no reason why surplus deficiency should be treated differently. In my view they should not be, and they are not, liable to a separate assessment.

In my opinion, the learned Judge in the lower Court was wrong in rejecting the plaint in the suit on the ground that insufficient court-fee had been paid. The order rejecting the plaint should be set aside, this revision petition be allowed and the matter remanded back to the Subordinate Judge of Salem for him to accept the plaint and to act in accordance with this judgment. The petitioner is entitled to his costs which will be paid by the Government.

Appeal No. 434 of 1945 is also allowed. Costs of that appeal will be costs in the suit. Court-fee paid on the memorandum of appeal will be refunded.

Rajamannar. J.—I agree.

B.V.V. *Petition and appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Munuswamy .. *Appellant.**

Penal Code (XLV of 1860), sections 379, 75 and 73—Sentence in case of simple theft—Previous convictions—Effect of—Direction for solitary confinement—When to be made.

Although the fact of previous convictions is an element in determining the sentence, essential regard should be had to the facts of the case, the gravity of the offence and the circumstances in which it was committed in assessing the punishment and the mere circumstance that there were previous convictions should not result in the infliction of a sentence that is far out of proportion to the merits of the main case. In the case of a simple theft without any aggravating circumstances a sentence of rigorous imprisonment for one year would more than meet the ends of justice even though the accused might have been convicted on several prior occasions under section 379, Indian Penal Code.

A sentence of solitary confinement though legal must be awarded, if ever, only in the most exceptional cases of unparalleled atrocity or brutality.

Decision in Crl. App. No. 114 of 1947, referred to.

Appeal against the sentence passed by the Special Honorary Presidency Magistrate, Egmore, of the Court of the Presidency Magistrates, Egmore, Madras on 6th February, 1947, in C.C. No. 230 of 1947.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

Accused not represented.

The Court delivered the following

JUDGMENT.—The appellant has been convicted by a Special Honorary Presidency Magistrate under section 379 read with section 75 of the I.P.C. and sentenced to two years' rigorous imprisonment. The Magistrate has further directed that out of that period, one month should be passed in solitary confinement.

This is a simple case of theft. P.W. 1, a weaver in the Buckingham and Carnatic Mills, was, after receiving his pay, coming home. On the way he stopped at a shop and bargained for a ready-made shirt. At that place the appellant is said to have removed from P.W. 1's pocket some currency notes which represented his salary. He was immediately caught and handed over to the police with the currency notes.

The appellant admitted the offence and pleaded guilty to the charge under section 379 as well as to the charge under section 75 of the Penal Code. The only question therefore is as to the sentence. In a case of this kind which does not contain any circumstances whatever of an aggravating nature the ordinary sentence would have indeed been very light. There is however the fact that the appellant has been convicted under section 379, I.P.C., on several occasions before and the last conviction was on the 4th January, 1945, when he was sentenced to undergo

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*Crl.A.No. 136 of 1947. 18th March, 1947.

rigorous imprisonment for two years. It has been held in a number of decisions by this Court that although the fact of previous convictions is an element in determining the sentence, essential regard should be had to the facts of the case, the gravity of the offence and the circumstances in which it was committed in assessing the punishment and the mere circumstance that there were previous convictions should not result in the infliction of a sentence that is far out of proportion to the merits of the main case. In the present case taking into account all the previous convictions and the circumstances of the case, I am definitely of the view that a sentence of rigorous imprisonment for one year would more than meet the ends of justice.

As regards the sentence relating to solitary confinement, the attention of the Magistrate is invited to my judgment in Criminal Appeal No. 114 of 1947. As pointed out in that Judgment, although the imposition of the sentence of solitary confinement was legal, under the Larceny Act of 1861 (24 and 25 Victoria, Chapter 96) the power was very rarely exercised by a Criminal Court. By enacting 56 and 57 Victoria Chapter 54, on 22nd September, 1893, the provisions in the Larceny Act relating to solitary confinement, which had become obsolete for several decades by that date were formally repealed. A century of experience has thus led to its abandonment in the United Kingdom and at the present day it stands condemned and has generally given place to work in association during the day and confinement in cell for the night, in cases where isolation at night is considered necessary for a brief time for particular prisoners and exclusively for the maintenance of prison discipline. Although in the medieval times under the influence of the ecclesiastics it was considered that cellular confinement was a means of promoting reflection and penitence, it came since to be realised that this kind of treatment leads to a morbid state of mind and not infrequently to mental derangement and as a form of torture it fails in its effect on the public. It must therefore, so long as it is part of the Indian Penal Code, be administered, if ever, in the most exceptional cases of unparalleled atrocity or brutality. The sentence of rigorous imprisonment is reduced to one year and the sentence of solitary confinment is set aside.

V.S. *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Karunai Ammal and others .. *Petitioners**

v.

Karuppan Goundan and another .. *Respondent.*

Criminal Procedure Code (V of 1898), section 145—Property in custodia legis—*Declaration of title in Civil Court—Prayer for possession—Necessity—Duty of Criminal Court to give effect to declaration by the Civil Court—Lessees under person appointed by Court for management under section* 146, *Criminal Procedure Code—Rights of, after declaration of rights of parties.*

Where at the time of filing a Civil suit in respect of property about which there is a dispute the property is in *custodia legis*, all that is necessary for the plaintiff in the suit is to seek a declaration of his title. It is not necessary for him to ask further for possession of the property as the Criminal Court would be bound to respect the declaration made by the Civil Court and to give due effect to it.

Sundaresa v. *Sarvajana Sowkiabi Virdhi Nidhi, Ltd.*, (1939) 2 M.L.J. 624 : I.L.R. (1939) Mad. 986 and *Sesha Reddi* v. *Narasimha Reddi*, A.I.R. 1941 Mad. 803 (2) referred to.

Where the property has been leased to lessees by the person appointed by the Court for the management of the land under section 146, Criminal Procedure Code, after the declaration of the rights of the

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*Crl.R.C. No. 509 of 1946.
(Crl.R.P. No. 489 of 1946). 10th March, 1947.

parties, the custody of the Court comes to an end and with it the leases and the lessees have no further rights in the property.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Karur dated 3rd May, 1946 in M.C. No. 44 of 1938.

V. V. Raghavan for Petitioners.

G. Gopalaswami for Respondents.

The Court made following

ORDER.—The order of the Magistrate in this case is clearly wrong. At the time of the filing of the civil suit, the property was in *custodia legis* and all that was necessary for the plaintiff in the civil suit was to seek a declaration of his title. It was not necessary for him to ask further for possession of the property as the criminal Court would be bound to respect the declaration made by the Civil Court and to give due effect to it. (See *Sundaresa* v. *Sarvajana Sowkiabi Virdhi Nidhi*[1], and *Sesha Reddi* v. *Narasimha Reddi*[2]). Another circumstance to be noticed in this case is that the present respondents were defendants 1 and 2 in the civil suit. When they raised the contention in that suit that the suit was bad because it was for a mere declaration and no consequential relief was prayed for, issue No. 10 was framed upon this contention in these words, "Whether the suit is barred by section 42 of the Specific Relief Act."

The Court found that issue in the negative. The respondents have no title to the land as found by the Civil Court and the petitioners have been declared to be entitled to the whole of item No. 1 and two acres in item No. 2, while defendants 3 to 5 who are not parties to the proceedings under section 145 of the Criminal Procedure Code have been declared to be entitled to the rest of item No. 2. Defendants 1 and 2 claimed as lessees under the Revenue Inspector who was appointed by the Court for the management of the land under section 146. After the declaration of the rights of the parties the custody of the Court must come to an end and with it the lease under which the respondents claim any interest in the land.

The petition is allowed and the order of the Sub-Divisional Magistrate is set aside. The lower Court will take necessary steps to transfer the possession of the property to the petitioners in accordance with the declaration made by the civil Court and also direct payment to them out of the rent realisations in accordance with the civil Court's decree.

V.S. *Petition allowed.*

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1. (1939) 2 M.L.J. 624 : I.L.R. 1939 Mad. 986.
2. A.I.R. 1941 Mad. 803 (2).

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—LORD WRIGHT, LORD DU PARCQ, LORD NORMAND, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Zahiruddin .. *Appellant**

v.

The King-Emperor .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 162 (1) and 172 (1)—Contravention of the provisions of—Effect—Curability under section 537, Criminal Procedure Code—Refusal of magistrate to overlook an irregularity.

The effect of a contravention of section 162 of the Criminal Procedure Code depends on the prohibition which has been contravened. If the contravention consists in the signing of a statement made to the police and reduced into writing, the evidence of the witness who signed it does not become inadmissible. There are no words either in the section or elsewhere in the statute which express or imply such a consequence. Still less can it be said that the statute has the effect of vitiating the whole proceedings when evidence is given by a witness who has signed such a statement. But the value of his evidence may be seriously impaired as a consequence of the contravention of this statutory safeguard against improper practices.

The use by a witness while he is giving evidence of a statement made by him to the police raises different considerations. The categorical prohibition of such use would be merely disregarded if reliance were to be placed on the evidence of a witness who had made material use of the statement when he was giving evidence at the trial. When the magistrate or a presiding judge discovers that a witness has made material use of such a statement, it is his duty under the section to disregard the evidence of that witness as inadmissible.

A contravention of section 172, Criminal Procedure Code, lays the evidence of the police officers open to adverse criticism and may diminish its value, but it does not have the effect of making that evidence inadmissible.

Section 537, Criminal Procedure Code, cannot apply to a case in which the magistrate has refused to overlook an irregularity and has acquitted.

J. D. Casswell K.C. and *A. G. P. Pullan* for Appellant.

B. Mackenna for Respondent.

Casswell.—The main ground of appeal is that the High Court have convicted the appellant in reliance on the evidence of a witness made from a signed statement given by the said witness to the police in contravention of section 162 of the Code of Criminal Procedure, on the erroneous assumption that this was an irregularity curable by section 537 of the Code.

A further ground of appeal is that the appellant has been gravely prejudiced by the failure of the police during investigation to follow the mandatory provisions of section 172 of the Code and to record the statement of witnesses, by which the evidence of those witnesses in Court could be checked in cross-examination.

Thirdly, it is submitted that in allowing this appeal from an acquittal, the High Court has failed to observe the principles laid down for the decision of such appeals in *Sheo Swarup* v. *King-Emperor*[1].

A witness to the search was a Mr. Roy a magistrate who appeared as a search witness and not two witnesses from the locality; the relevant sections are 165 and 103 of the Code. When Roy goes into the witness-box he is refreshing his memory from a statement made to the police ; the said statement was not in compliance with the provisions of section 162, in as much as Roy signed it, and was used in contravention of the principles of section 162, in as much as he used it to refresh his memory in Court. The High Court is in error in finding that this misuse of section 162 could be cured by section 537, and in saying that Roy's evidence would be the same had he not used the inadmissible statement in Court.

Apart from Bhattacharjee who was an accomplice, Roy was the only witness of the giving of the money, and Bhattacharjee himself was the only witness of the demand for money.

On the basis of *Sheo Swarup's case*[1], I submit that the High Court should not have interfered with an acquittal, in view specially of the Magistrate's opinion of Bhattacharjee. As to this witness the Magistrate said : "It is difficult to rely on such untruthful witness. His demeanour in Court was most unsatisfactory. I disbelieve him as he appears to have no regard for the truth."

Pullan followed.—The High Court had themselves found that Roy's evidence was inadmissible, and this finding should have debarred them from basing any finding on it.

(The Board did not wish to see the authorities on an accomplice's evidence or on section 172 of the Code.)

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*P.C. Appeal No. 82 of 1946. 18th February, 1947.

1. (1934) 67 M.L.J. 664 : L.R. 61 I.A. 398 : I.L.R. 56 All. 645 (P.C.).

Mackenna.—The misuse of section 162 of the Code was an irregularity which did not render Roy's evidence inadmissible. The irregularity must not be allowed to impair the value of the evidence, and the High Court has taken the correct view of its effect in the present case. Dutt and Lahiri gave sufficient corroboration of Bhattacharjee, and even without Roy's evidence there was enough other evidence accepted as reliable by the High Court to justify the conviction. No miscarriage of justice has occurred.

Caswell replied.

Their Lordships' Judgment was delivered by

LORD NORMAND.—This is an appeal from a judgment of the High Court in Bengal, which allowed an appeal against a Police Magistrate's order acquitting the appellant of a charge of accepting a bribe brought under section 161 of the Indian Penal Code. The High Court set aside the order of acquittal, convicted the appellant and sentenced him to one year's rigorous imprisonment.

The main ground of appeal is that there have been contraventions of section 162 of the Code of Criminal Procedure, that the High Court's judgment relies on the testimony of a witness, Mr. Roy, who had given a signed statement to the police in breach of the section and had, also in breach of the section, had it before him and made substantial use of it while he was giving evidence. It was also made a ground of appeal that the police officers engaged on the investigation had failed to keep a diary in contravention of section 172 (1).

The appellant was employed from June till the 24th August, 1944, by the East Indian Railway as a grain depot officer at Howrah station. His chief duty was to receive from contractors articles for which orders were placed by the head office of the company, to compare them with approved samples and subsequently to distribute them. On 22nd August, 1944, a contractor named Bhattacharjee reported to Deputy Superintendent Dutt of the Calcutta Police that the appellant had solicited from him a bribe of 400 rupees to pass a sale of 80 maunds of mustard oil and that he proposed to make this payment next day. Bhattacharjee subsequently gave evidence at the trial that the appellant had made this demand, but this evidence was not corroborated by any other witness. A police trap was laid for the appellant on the 23rd August, but its only result was that Bhattacharjee reported that the appellant was now refusing to take 400 rupees and was demanding that 800 rupees should be paid to him on the 24th August at his residence at Park Circus. Another police trap was therefore prepared for the appellant and on 24th August Police Superintendent Dutt, Mr. Roy, a magistrate whose services as a witness had been obtained, Police inspector Lahiri and Bhattacharjee went in a taxi driven by one Yasin to the block of flats in Park Circus where the appellant and his brother Nazimuddin lived. It was then after 8 p.m., the black-out was in force, and it was raining heavily. It was decided that Bhattacharjee should stay in the taxi with Mr. Roy, while Mr. Dutt and Inspector Lahiri stood by a lorry which was stranded on the pavement between the taxi and the flats. One of the party then called the door-keeper, Ram Surdar, and sent him with a message to the appellant that someone had come by taxi to see him but was prevented by an injured leg from going up to the appellant's flat.

From this point the controversy of fact between the parties becomes acute. Bhattacharjee deponed that the accused came out of the block of flats, entered the taxi, took the seat beside the driver and, after asking who Mr. Roy was, and whether Bhattacharjee had brought the money with him, received from Bhattacharjee marked notes to the value of Rs. 800. Bhattacharjee further says that after some more talk the accused left the taxi, that he, Bhattacharjee, then gave a pre-arranged signal by flashing his torchlight, and that he saw the appellant being seized by the police witnesses.

The police witnesses testified that they saw the accused come down from his flat and enter the taxi, that after seeing the signal made by the torchlight they arrested him as he was about to re-enter the block of flats, and that as they did so he flung away a bundle of notes which they later found on the mudguard of the stranded lorry and identified as the notes previously marked. Mr. Roy gave evidence

which corroborated Bhattacharjee's evidence about the passing of the marked notes from Bhattacharjee to the appellant, and the flashing of the torch ; and which corroborated also the police evidence about the finding of the notes after the arrest of the appellant. Though Mr. Roy identified in Court the appellant's brother as the man who had taken the notes in the taxi, he identified the man who was arrested and who was undoubtedly the appellant with the man who received the notes. His identification of the brother in Court may therefore have been a mistake. What is more important is that the magistrate has entered on the record at the end of Mr. Roy's examination-in-chief this note :

> "He refreshed his memory, from time to time, by consulting his written statement to the police during investigation."

The magistrate called as Court witnesses under section 540 of the Criminal Procedure Code the door-keeper of the block of flats, Ram Surdar, and the taxi-driver, Yasin and they gave evidence that it was not the appellant but his brother who was in the taxi at the material time.

The Police magistrate in his judgment, after expressing his complete distrust of Bhattacharjee and commenting adversely on the police evidence, speaks of Mr. Roy's defect of memory as evidenced by his free use of the written statement while he was deponing. The statement was made to the police three months after the events with which it dealt, it was signed by him and it was made to the police in the course of their investigation of the alleged offence. The magistrate held that when a police officer during the investigation of an offence obtains a signed statement from a witness in contravention of section 162 of the Criminal Procedure Code the evidence of the witness at the trial must be rejected. The record does not disclose how it came about that the magistrate did not stop Mr. Roy at the beginning of his evidence from using the statement, and their Lordships are not disposed to seek information about this from sources outside the record. They must assume that the magistrate intervened, as was his duty, as soon as he became aware of the irregularity.

The learned judges of the High Court held

> "that breaches of the provisions of section 162 of the Code of Criminal Procedure are not in themselves necessarily fatal to the proceedings and may in appropriate circumstances be cured as the expression is under the terms of section 537 of the Code of Criminal Procedure."

In their opinion there was no substantial reason for thinking that Mr. Roy's evidence without the use of the statement to refresh his memory would have been in any material particular different from the evidence which he actually gave. For this reason they held Mr. Roy's evidence to be admissible, and they greatly relied on it in reaching the conclusion that the appeal from the magistrate's order should be allowed and that the appellant should be convicted.

The objection to the conviction founded on the failure of the police witnesses to keep a diary as required by section 172 (1) of the Criminal Procedure Code may be conveniently disposed of at this stage. It was contended by learned counsel for the appellant that the evidence of the officers was inadmissible. This contention was not supported by reference to the statute or to authority, nor was it the view taken by the magistrate. In the opinion of their Lordships a contravention of section 172 lays the evidence of the police officers open to adverse criticism and may diminish its value, but it does not have the effect of making that evidence inadmissible.

The next question concerns the effect of section 162 (1) of the Criminal Procedure Code, which provides that no statement made by any person to a police officer in the course of an investigation shall, if reduced into writing, be signed by the person making it ; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (saving certain exceptions not material to the present proceedings) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. It was submitted for the appellant that the proceedings were entirely vitiated and, alternatively, that Mr. Roy's evidence

was rendered inadmissible, for either of two reasons: first, because he had previously given a signed statement to the police, and, second, because in giving his evidence he made use of the signed statement to prompt his memory. On the other hand it was argued for the respondent that a contravention of section 162 (1) merely affected the value of the evidence and that the High Court had taken the correct view of its effect in the present case. It appears to their Lordships that the effect of a contravention of the section depends on the prohibition which has been contravened. If the contravention consists in the signing of a statement made to the police and reduced into writing, the evidence of the witness who signed it does not become inadmissible. There are no words either in the section or elsewhere in the statute which express or imply such a consequence. Still less can it be said that the statute has the effect of vitiating the whole proceedings when evidence is given by a witness who has signed such a statement. But the value of his evidence may be seriously impaired as a consequence of the contravention of this statutory safeguard against improper practices. The use by a witness while he is giving evidence of a statement made by him to the police raises different considerations. The categorical prohibition of such use would be merely disregarded if reliance were to be placed on the evidence of a witness who had made material use of the statement when he was giving evidence at the trial. When, therefore, the magistrate or presiding judge discovers that a witness has made material use of such a statement it is his duty under the section to disregard the evidence of that witness as inadmissible. In the present case there is in the note at the end of Mr. Roy's examination-in-chief and in the judgment of the magistrate what amounts to a finding of fact that Mr. Roy while giving his evidence made substantial and material use of the signed statement given by him to the police, and the magistrate was accordingly bound to disregard his evidence. The maigstrate's reason for doing so is too broadly stated, for it is not the mere fact that Mr. Roy had signed the statement but the fact that he had it before him and consulted it in the witness-box that renders his evidence incompetent.

It follows that in the opinion of their Lordships the learned Judges of the High Court erred in law when they treated Mr. Roy's evidence as admissible. Section 537 of the Code of Criminal Procedure, to which they made reference, requires a Court of Appeal subject to the earlier provisions of the statute to affirm an order of a court of competent jurisdiction where there has been an irregularity in the proceedings unless the irregularity has in fact occasioned a failure of justice. The section cannot apply to a case like the present, in which the magistrate has refused to overlook an irregularity and has acquitted. The further observations of the learned judges that there was no substantial reason to think that Mr. Roy's evidence unaided by the written statement would have been in any material point different from the evidence which he gave, and that no real prejudice was caused to the appellant by the use of the statement, are in the opinion of their Lordships unfortunate and ill founded. It is impossible to say what Mr. Roy's evidence would have been if he had not used the statement to aid his memory; and it is also impossible to say that prejudice may not have been suffered by the appellant. But the conclusive answer to the reasoning of the judgment is that the language of the statute clearly prohibits any such use of the statement, and it must receive effect.

It was argued for the respondent that even without Mr. Roy's evidence there was a sufficiency of other evidence accepted as reliable by the learned judges of the High Court to justify the conviction. While it is true that the police evidence taken along with the evidence of Bhattacharjee is relevant to infer the guilt of the appellant, that evidence is contradicted by other witnesses, and it has been the subject of adverse comment by the magistrate. It is possible also that the High Court would have treated the evidence of the police and Bhattacharjee with less respect if it had not had Mr. Roy's evidence before it. The judgment of the High Court largely depends on his evidence. It could therefore be neither logical nor fair to affirm the order of the High Court, while holding that the Court erred in taking Mr. Roy's evidence into consideration. On the other hand the submission for the appellant that the acquittal by the magistrate should at this stage be finally

re-affirmed would have been appropriate if the irregularity which has taken place had had the effect of vitiating the whole proceedings, but it is too favourable to the appellant on the opinion which their Lordships have expressed upon the effect of section 162. The appellant's complaint that the High Court had failed to have due regard to the principles laid down in *Sheo Swarup* v. *The King-Emperor*[1], would have had greater force if the High Court had not believed itself entitled to rely on the evidence of Mr. Roy, and without that evidence these principles will manifestly have a special relevance to the circumstances of the case.

Their Lordships consider that the fair course is to allow the appeal to the effect of setting aside the order of the High Court, and to remit to the High Court to re-hear and determine the appeal on the evidence in the case subject to a direction to exclude from consideration the evidence of Mr. Roy and to deny it all effect.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant : *Douglas Grant & Dold.*

Solicitor for Respondent : *The Solicitor, India Office.*

H.J.U./V.S. ——— *Appeal allowed and remitted to High Court for re-hearing.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay[2].)

PRESENT :—LORD THANKERTON, LORD PORTER, LORD SIMONDS, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

The King-Emperor .. *Appellant**

v.

Sadashiv Narayan Bhalerao .. *Respondent.*

Defence of India Rules (1939), *rule* 34 (6) (e) *and Penal Code* (*XLV of* 1860), *section* 124-*A*—"*Prejudicial act*" *and sedition—Acts or words, if must incite to disorder—If same—Relevancy of English decisions in deciding as to what constitutes sedition.*

There is no material distinction between rule 34 (6), sub-paragraph (*e*) of the Defence of India Rules and section 124-A of the Penal Code. The omission in the Rule of the three explanations in the Penal Code do not lead to any difference in construction.

The word 'sedition' does not occur either in section 124-A of the Penal Code or in rule 34 of the Defence of India Rules ; it is only found as a marginal note to section 124-A and it is not an operative part of the section, but merely provides the name by which the crime defined in the section will be known. There can be no justification for restricting the contents of the section by the marginal note. In England where there is no statutory definition of 'sedition', its meaning and contents have been laid down in many decisions ; these decisions are not relevant when there is a statutory definition of the term 'sedition' in section 124-A of the Penal Code.

There is nothing in the language of either section 124-A or rule 34 which could suggest that the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency.

Niharendu Dutt Majumdar v. *King-Emperor*, (1942) F.C.R. 38 : (1942) F.L.J. 47, overruled.

Sir Walter Monckton, K.C. and *W. Wallach* for Appellant.

Respondent *Ex parte.*

Monckton.—The point here is that the Court below said that they would have decided the case in favour of the appellant, had they not been governed by the decision of the Federal Court in *Niharendu Dutt Majumdar* v. *The King-Emperor*[3], which in giving the decision by which the High Court erroneously held itself to be bound, neglected to mention the settled law on the point contained in various decisions, including some of the Privy Council. In 1943, the respondent made and published the document in question and distributed copies thereof. What we have to look at in this document is that it attempts to create disaffection against the Government. That the leaflet does do so is abundantly clear in the opening paragraph, where it says, " Unprecedented calamity has befallen our nation and the whole of our country has been undergoing sufferings. The Imperialists have by their barbarous policy turned the entire country into a cremation ground,—etc."

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1. (1934) 67 M.L.J. 664 : L.R. 61 I.A. 398 : I.L.R. 56 All. 645 (P.C.).
2. (1944) 46 Bom.L.R. 459.
3. (1942) F.C.R. 38 : (1942) F.L.J. 47.

*P.C. Appeal No. 49 of 1946. 18th February, 1947.

Refers to section 124-A of the Penal Code. I submit that there is no material difference between rule 34 (6) sub-para. (e) and section 124-A of the Penal Code. Cases under section 124-A of the Penal Code have decided that the offence consists in exciting or attempting to excite in others bad feelings towards the Government; there is no need for exciting disorder. I submit that it is no part of the definition of a prejudicial report under rule 34 (6) (e), that the report should incite to disorder. The decision of the Federal Court to this effect is inconsistent with the *ratio decidendi* of certain Privy Council decisions.

Tilak v. *Queen-Empress*[1], *Besant* v. *Advocate-General of Madras*[2], *Wallace Johnson* v. *The King*[3], referred to.

I submit further that the learned Judges of the High Court were wrong in holding that in view of section 212 of the Government of India Act, 1935, they were bound in this case to accept the law as declared by the Federal Court in *Majumdar's case*, where there is a conflict between the Federal Court and the Judicial Committee, the decision of the Judicial Committee is binding on the Courts in India.

Their Lordships' Judgment was delivered by

LORD THANKERTON.—This is an appeal by special leave from a judgment of the High Court of Judicature at Bombay[4], dated the 25th January, 1944, which affirmed an order of Mr. S. D. Adhav, Magistrate of the 1st Class, Jalgaon City, dated the 22nd June, 1943, acquitting the respondent who had been charged under rule 38 (5) of the Defence of India Rules for having, on the 26th January, 1943, made, published and distributed copies of a leaflet which contained prejudicial reports within the meaning of rule 34 (7) read with rule 34 (6) (e) and (g) of the Defence of India Rules, and having thus contravened rule 38 (1) (c).

The Defence of India Rules, which were made by the Central Government under section 2 of the Defence of India Act, 1939 (Act No. XXXV of 1939)—so far as material—provide as follows :

"34. (6) 'prejudicial act' means any act which is intended or is likely—

* * * * * * * * *

(e) to bring into hatred or contempt, or to excite disaffection towards, His Majesty or the Crown Representative or the Government established by law in British India or in any other part of His Majesty's dominions ;

* * * * * * * *

(g) to cause fear or alarm to the public or to any section of the public ;

* * * * * * * *

34. (7) 'prejudicial report' means any report, statement or visible representation, whether true or false, which, or the publishing of which, is, or is an incitement to the commission of, a prejudicial act as defined in this rule ;

* * * * * * * *

38. (1) No person shall, without lawful authority or excuse,

* * * * * * * *

(c) make, print, publish or distribute any document containing, or spread by any other means whatsoever, any prejudicial report ;

* * * * * * * *

(5) If any person contravenes any of the provisions of this rule, he shall be punishable with imprisonment for a term which may extend to five years or with fine or with both."

The document which formed the subject-matter of the charge was admittedly made and published by the respondent at Jalgaon City on the 26th January, 1943, and he admittedly distributed printed copies thereof. It consisted of a leaflet addressed "To all the patriots", and it will be sufficient to quote some of the statements in the leaflet :

"Unprecedented calamity has befallen our nation and the whole of our country has been undergoing sufferings. The Imperialists have by their barbarous policy turned the entire country into a cremation ground. When we were in great need of the national leaders for the purpose of the national defence, the bureaucracy has declared the National Congress unlawful and have detained all the leaders in jail.

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1. (1897) L.R. 25 I.A. 1 : I.L.R. 22 Bom. 528 (P.C.).
2. (1919) 37 M.L.J. 139: L.R. 46 I.A. 176 : I.L.R. 43 Mad. 146 (P.C.).
3. (1940) A.C. 231.
4. (1944) 46 Bom.L.R. 459.

By reason of firings and arrests several villages in Khandesh have been made desolate and on account of this great calamity the people are losing their moral courage (day by day) and the whole of the country is putting on moribund appearance. The people in Khandsh have been harassed by the inequitable collective fines. As the Government is unable to solve the food problem, the cry of hunger is heard everywhere; and a situation has arisen everywhere in which serious food riots are expected. By depriving the mills of the coal 50 thousand families of the workers have been thrown into the ditch of hunger.

But the Imperialists do not stop even at this. They are making ceaseless efforts to create a split between the people and the patriots. They have been trying to strengthen their hold by creating disputes and differences among the people by various ways such as creating a split between the owner and the worker on the question of dearness allowance and coal, between the merchants and consumers on the question of food grains and between the Muslims and the non-Muslims on the question of collective fines. The disunion among the people is their last resort.

* * * * * * * *

If we blindly carry on sabotage activities simply because the Imperialists are not transferring power to us the Japanese Imperialism may dominate over us. Therefore in order to face both these calamities we must achieve this great task of bringing about unity on the burning questions before the public such as national defence and self-determination and must take over the control of national defence."

After a trial, the learned Magistrate acquitted the respondent. He pointed out that it was nowhere suggested in the leaflet that the work of national defence should be snatched away from Government forcibly, that the national leaders should be freed by using force or that national government should be formed by resorting to unconstitutional methods, but that, on the contrary, the public was exhorted to achieve national unity for all the above purposes, not to resort to sabotage, and to take part in the campaign of achieving worldwide freedom. In the absence of any incitement to public disorder, he held himself bound to acquit, in view of the decision of the Federal Court in *Niharendu Dutt Majumdar* v. *King-Emperor*[1], to which their Lordships will refer later.

On appeal by the Crown, the decision of the Magistrate was affirmed by the High Court and the appeal was dismissed; the learned Judges held themselves bound by the decision of the Federal Court in *Niharendus' case*[1]. The charge of having committed a prejudicial act within the meaning of rule 34 (6) (*g*) was not pressed and may be disregarded. The learned Judges, at the request of the Crown, certified for the purpose of section 205 of the Government of India Act, 1935, that the case does not involve a substantial question of law as to the interpretation of the Government of India Act or any order in council made thereunder. Thereafter the Crown obtained special leave to appeal against the decision of the High Court on an undertaking

"that no further proceedings in connection with the said charges would be taken against the respondent in any event so long as that undertaking does not prejudice the reality of the appeal."

The respondent has not appeared in the appeal, which has been heard *ex parte*.

The purpose of this appeal is to challenge the soundness of the decision in *Niharendu's case*[1], which their Lordships will therefore consider in some detail. In consequence of a speech made at Calcutta, Niharendu was convicted by the Additional Chief Presidency Magistrate of offences under rule 34 (6), sub-paragraphs (*e*) and (*k*), of the Defence of India Rules. The conviction was upheld by the High Court, from which Niharendu appealed to the Federal Court, which allowed the appeal and acquitted the appellant on the ground that the speech of the appellant did not constitute a prejudicial act within the meaning of rule 34 (6) (*e*). The Federal Court did not deal with sub-paragraph (*k*) of rule 34 (6). The Judgement of the Court was delivered by Sir Maurice Gwyer, C.J., who said, in reference to sub-paragraph (*e*), that the prejudicial act was

"described in precisely the same language as is used to describe the offence of sedition in section 124-A of the Indian Penal Code. We were invited to say that an offence described merely as a 'prejudicial act' in the Defence of India Rules ought to be regarded differently from an offence described as 'sedition' in the Code, even though the language describing the two things is the same. We cannot accept this argument. Sedition is none the less sedition because it is described by a less

[1] (1942) F.C.R. 38 : (1942) F.L.J. 47.

offensive name; and in our opinion the law relating to the offence of sedition as defined in the Code is equally applicable to the prejudicial act defined in the Defence of India Rules. We do not think that the omission in the Rules of the three 'Explanations' appended to the section of the Code affects the matter. These are added to remove any doubt as to the true meaning of the Legislature; they do not add to or subtract from the section itself; and the words used in the Rules ought to be interpreted as if they had been explained in the same way."

The learned Chief Justice then proceeds to consider the meaning of sedition in English law, as defined and explained by decision of the Courts, and states the principle to be derived therefrom as follows:

"Public disorder or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency."

The learned Chief Justice then applied that test to the appellant's speech, and found that it contained no incitement, or intention or tendency to incite, to public disorder, and the conviction was set aside.

Their Lordships are unable to accept the test laid down by the learned Chief Justice, as applicable in India.

Their Lordships agree, for the purposes of the present appeal, that there is no material distinction between rule 34 (6), sub-paragraph (e) and section 124-A of the Penal Code, though it might be suggested that the words "an act which is intended or likely to bring" in the rule are wider than the words "brings or attempts to bring" in the Code. They further agree with the learned Chief Justice that the omission in the rule of the three explanations in the Code should not lead to any difference in construction.

The word "sedition" does not occur either in section 124-A or in the rule; it is only found as a marginal note to section 124-A, and is not an operative part of the section, but merely provides the name by which the crime defined in the section will be known. There can be no justification for restricting the contents of the section by the marginal note. In England there is no statutory definition of sedition; its meaning and content have been laid down in many decisions, some of which are referred to by the Chief Justice, but these decisions are not relevant when you have a statutory definition of that which is termed sedition, as we have in the present case.

Their Lordships are unable to find anything in the language of either section 124-A or the rule which could suggest that

"the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency."

The first explanation to section 124-A provides, "The expression 'disaffection' includes disloyalty and all feelings of enmity." This is quite inconsistent with any suggestion that "excites or attempts to excite disaffection" involves not only excitation of feelings of disaffection, but also exciting disorder. Their Lordships are therefore of opinion that the decision of the Federal Court in *Niharendu's case*[1] proceeded on a wrong construction of section 124-A of the Penal Code and of sub-paragraph (e) or rule 34 (6) of the Defence of India Rules.

In that view, their Lordships are of opinion that there should have been a conviction in the present case, for they have no difficulty in agreeing with the learned Judges of the High Court in this case, who have both stated that, if disorder were not an essential element, there are undoubtedly passages in the leaflet which hold the Government up to hatred or contempt, and which would have led them to convict.

In the High Court three decisions of this Board were referred to, but the learned Judges preferred the decision of the Federal Court in *Niharendu's case*[1] as the same sub-paragraph of rule 34 (6) was the subject of decision and it was the latest case; it is unnecessary to consider whether the learned Judges had sufficient ground for distinguishing these decisions such as would avoid the binding nature of decisions of this Board. In the opinion of their Lordships, the principle of decision in these three cases is inconsistent with the decision of the Federal Court in *Niharendu's*

1. (1942) F.C.R. 38: (1942) F.L.J. 47.

case, and it is regrettable that the Federal Court did not pay attention to these cases, two of which are Indian.

In *Queen Empress* v. *Bal Gangadhar Tilak*[1], the charge was under section 124-A as it then stood, confined to disaffection, without any reference to hatred or contempt. Strachey, J., in an admirable charge to the jury which was subsequently approved by this Board, said (at p. 135):

"The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance, or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within section 124-A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance, to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt. I can only account for such a view by attributing it to a complete misreading of the explanation attached to the section and to a misapplication of the explanation beyond its true scope."

In refusing leave to appeal, *inter alia*, on the ground of misdirection as to the proper construction of section 124-A, the Board expressly approved of the charge. It is sufficient for their Lordships to adopt the language of Strachey, J., as exactly expressing their view in the present case.

In *Besant* v. *Advocate General of Madras*[2], it was pointed out by the Board that section 4 of the Indian Press Act, of 1910, which was under consideration in that case, was closely similar in language to section 124-A of the Penal Code, which had been the subject of careful consideration in *Tilak's* Case, above referred to.

In *Wallace-Johnson* v. *The King*[3], under sub-section 8 of section 326 of the Criminal Code of the Gold Coast,

"seditious intention' was defined as an intention "to bring into hatred or contempt or to excite disaffection against . . . . . the Government of the Gold Coast as by law established."

It was held by this Board that the words were clear and unambiguous, and that incitement to violence was not a necessary ingredient of the crime of sedition as thereby defined.

In conclusion, their Lordships will only add that the amendments of section 124-A in 1898, the year after *Tilak's* case, by the inclusion of hatred or contempt and the addition of the second and third explanations, did not affect or alter the construction of the section laid down in *Tilak's* case, and, in their opinion, if the Federal Court in *Niharendu's* case, had given their attention to *Tilak's* case they should have recognised it as an authority on the construction of section 124-A by which they were bound.

Their Lordships are accordingly of opinion that the appeal should be allowed and that the judgments and orders of the Courts below should be set aside, and that it should be declared that it is not an essential ingredient of a prejudicial act as defined in sub-paragraph (*e*) of rule 34 (6) of the Defence of India Rules that it should be an act which is intended or is likely to incite to public disorder. Their Lordships will humbly advise His Majesty accordingly. There will be no order as to costs.

Solicitor for Appellant: *The Solicitor, India Office.*

H.J.U./V.S. — *Appeal allowed.*

1. (1897) I.L.R. 22 Bom. 112 and 528.
2. (1919) 43 Mad. 146 L.R. 46 I.A. 176.
3. (1940) A.C. 231.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SHAHAB-UD-DIN.

Venkatarama Pillai .. *Petitioner**

v.

Parasurama Pillai .. *Respondent.*

Civil Procedure Code (V of 1908), Order 22, rules 3 and 10—Scope of rule 10—Application to bring legal representative on record—Petition presented under rules 3 and 10—Affidavit disclosing application to be one under rule 3—Order passed by Court—Appealability.

Rule 10 of Order 22, Civil Procedure Code, does not apply to those cases which are specified in the rules that precede it. It has therefore to be taken as providing for cases of assignment, creation and devolution of interest other than those mentioned in rules 2, 3, 4, 7 and 8.

If in spite of the fact that the petition to bring the legal representative on record really falls under rule 3 of Order 22, Civil Procedure Code, the Court deals with it as if it lay under rule 10, an appeal will be competent. But where the affidavit accompanying the petition shows that it was made under rule 3 the mere fact that the petition was in terms presented under rules 3 and 10 will not make the order passed one under rule 10 so as to render the decision on it appealable.

Muthiah Chettiar v. *Govindadoss Krishnadoss*, (1921) 41 M.L.J. 316 : I.L.R. 44 Mad. 919, distinguished.

Ch. Raghava Rao and *Durga Bai* for Petitioner.

B. V. Viswanatha Aiyar for Respondent.

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of North Arcot at Vellore, dated 27th March, 1945, and made in C.M.A. No. 110 of 1944 and 113 of 1944 respectively (In I.A. No. 1104 of 1943 in O.S. No. 575 of 1942 and in I.A. No. 198 of 1944 in O.S. No. 575 of 1942 on the file of the Court of the District Munsiff or Tiruvannamali respectively).

The Court delivered the following

JUDGMENT.—The respondent in both the petitions was the second defendant in O.S. No. 575 of 1942 which was filed by his mother, Viradambal. He had a brother Chenna Pillai who died in 1939. Chenna Pillai, the respondent and their half brother Govinda Pillai, the first defendant, had partitioned their properties during the life-time of their father. The case of the respondent's mother was that Chenna Pillai was solely entitled to the suit property as it had fallen to his share at the partition and that after his death she had the right to enjoy it as he died a bachelor. It was also her case that the respondent (second defendant), the first defendant and his son, the third defendant, and defendants 4 and 5, sons of the respondent trespassed upon the suit property and alienated portions of it to defendants 6 to 8 without her knowledge. She therefore prayed for a declaration that she was entitled to a life interest in the suit property and that the alienation by defendants 1 to 5 was not binding on her. She also prayed for possession. Defendants 1 and 3 contested the suit while the second defendant (respondent) supported his mother. The suit was dismissed for default of appearance of Viradambal and she presented an application for setting aside the order of dismissal. While that application was pending she died on the 16th of November, 1943. The respondent thereupon filed two applications before the District Munsiff. He filed I.A. 198 of 1944 for recognising him as the legal representative of his deceased mother on the ground that he being the full brother of Chenna Pillai was entitled to the property after the death of the mother to the exclusion of the first defendant. He filed I.A. No. 199 of 1944 for his being transposed as the plaintiff and for permission to continue I.A. No. 1104 of 1943 for setting aside the order dismissing the suit. The learned District Munsiff dismissed both the applications on merits in a common order. He then dismissed I.A. No. 1104 of 1943 without going into the merits. With

* C.R.P. Nos. 769 and 770 of 1945. 13th September, 1946.

regard to I.A. Nos. 198 and 199 of 1944 he held that the petitioner was not the only legal representative and that he should not be transposed as the plaintiff in view of the fact that his interest was not identical with that of his mother who had claimed only a life interest and had alleged that the respondent was one of the alienors. The respondent filed an appeal only in respect of the application to recognise him as the legal representative. He appealed also against the order in I.A. No. 1104 of 1943 but he did not appeal as far as the application for transposing himself as plaintiff was concerned. The learned District Judge allowed the appeals holding that the respondent was the sole representative of his mother, being the full brother of Chenna Pillai. He therefore directed the District Munsiff to take on file the application to set aside the order of dismissal of the suit and dispose of it on merits.

It is argued on behalf of the petitioner that though the respondent is the sole heir of Chenna Pillai and the view taken by the District Munsiff that he was not the sole heir is not correct, still the order of the District Munsiff has to be regarded as final as it was an order under Order 22, rule 3 of the Code of Civil Procedure and therefore not appealable and the learned District Judge consequently had no jurisdiction to set it aside. As regards the appeal against the order in I.A. No. 1104 of 1943 the contention is that the learned Judge committed a material irregularity in the exercise of his jurisdiction. It is said that the respondent could not be permitted to continue the application to set aside the order of dismissal of the suit as the trial Court had dismissed both the applications and the plaintiff had not appealed against the order declining to transpose him as the plaintiff. It is further pointed out that the learned Judge did not take into consideration the fact that Viradambal had in her suit alleged that the respondent was one of the persons who had trespassed on the property and had effected alienations. The contention is that if this point had been considered by the learned Judge he would not have interfered.

On behalf of the respondent it is argued that as the application for bringing him on record as the legal representative mentions not only rule 3 but also rule 10 of Order 22 of the Code and as it was not contended before the District Judge that the appeal was not competent it has to be presumed that the District Munsiff purported to act under rule 10 and therefore the appeal to the District Judge against the order on I.A. No. 198 of 1944 was competent. In this connection reliance is placed on the decisions in *Muthiah Chettiar* v. *Govindadoss Krishnadoss*[1], and *Raman Nambiyar* v. *Rayiram Nanan*[2]. It is also contended that having regard to the fact that the objection now taken is technical this Court should not interfere in revision.

The application filed by the respondent to bring him on record as the legal representative is in my opinion clearly an application under rule 3 of order 22. In the affidavit accompanying the application it is stated as follows :—

> "As after her (Viradambal's) death, I am the person entitled to succeed to all the suit properties I am entitled to continue the suit and obtain relief. Therefore, in I.A. 1104 of 1943 filed for the restoration of the suit and for fresh trial I am entitled to be brought on record as the second petitioner . . . . There are no other heirs to the said Viradambal Ammal excepting me. I alone have the right to succeed to the properties of Chenna Pillai, referred to in the plaint. In every way I alone am entitled to continue the petition in I.A. No. 1104 of 1943.
>
> Therefore, it is just and necessary that I should be recognised as the heir of Viradambal Ammal, the plaintiff-petitioner herein and given leave to continue the said I.A. No. 1104 of 1943 and conduct the suit."

Rule 3 of Order 22 lays down the procedure to be followed in case of death of one of the plaintiffs or of the sole plaintiff. Rule 10 on the other hand runs thus :

> "In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

This rule does not apply to those cases which are specified in the rules that precede it. Rule 10 has, therefore, to be taken as providing for cases of assignment, creation

1. (1921) 41 M.L.J. 316 : I.L.R. 44 Mad. 919.
2. (1934) 67 M.L.J. 43 : I.L.R. 57 Mad. 777.

and devolution of interest other than those mentioned in rules 2, 3, 4, 7 and 8. It is no doubt true that if in spite of the fact that the petition really comes under rule 3 the District Munsiff had dealt with it as if it lay under rule 10, an appeal would be competent. But in my opinion it cannot be said that in this case the District Munsiff purported to act under rule 10. The averments in the affidavit extracted above clearly make out a case under rule 3. There is nothing in the order of the District Munsiff to show that he treated the petition as one coming under rule 10. In *Muthiah Chettiar* v. *Govinddoss Krishnadoss*[1], it was no doubt held that an order purporting to be passed under Order 22, rule 10, Civil Procedure Code, is appealable though on the facts the order should not have been passed under that rule. But in that case, from the judgment of the District Judge it was clear that he acted under rule 10. Similarly, in the other case the judgment of the trial Court clearly showed that it acted under an order which is appealable. I therefore consider that the appeal before the learned District Judge, as far as the application of the respondent to bring him on record as the legal representative was concerned, was not competent.

As regards the appeal against the order on I.A. No. 1104 of 1943 the relief asked for in that application can be granted only if the respondent is recognised as the legal representative and is transposed as the plaintiff. But his applications filed in this respect were dismissed by the District Munsiff and the order on them became final as in the one case the appeal was not competent while in the other case no appeal was filed.

There is no force in the contention that this is not a fit case for interference in revision. It is no doubt true that the objection now raised with regard to jurisdiction of the learned District Judge was not raised before him, but that fact does not debar the petitioner from raising the objection now though it can be taken into consideration on the question of costs. It is no doubt conceded that the respondent is the sole heir of Chenna Pillai but the fact remains that the order of the District Judge on the main application was one without jurisdiction, the appeal before him not being competent, and according to the plaint the respondent himself is one of the persons who effected the alienations, to set aside which the suit had been filed.

I therefore set aside the orders of the learned District Judge and restore those of the District Munsiff. The revision petitions are allowed but in the circumstances of the case, there shall be no order as to costs.

B.V.V. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE GOVINDARAJACHARI.

Kamisetti Subbarayadu .. *Appellant**

v.

Pathi Subbamma. .. *Respondent.*

Will—Construction—Bequest to son with full powers of enjoyment and direction to give possession on attaining majority —Provision conferring option to a person to purchase from the executors a particular house at a fixed price —Option if can be exercised after executors have handed over property to legatee.

A testator provided by her will *inter alia* " . . . . If my elder sister *S* is willing to purchase the right to a half share possessed by me in item 3 to D Schedule out of the immoveable property belonging to me, my executors shall receive from the said *S* half of the amount relating to the deed of sale in respect of the said house obtained by me and the said *S*, sell to her (*S*) my right to a half share in the said house, execute a sale deed in her favour and deliver the same after getting it registered. If the said *S* is not willing to purchase the said house, the said house shall be sold in public and my half share of the amount realised thereby, shall be kept in deposit in a Government bank or Government bonds shall be purchased with the same or the executors shall advance the amount for interest at a reliable place and augment the same . . . ."

The provision was preceded by a recital that the testator's son shall enjoy all the property with full powers of gift, sale, etc. and finally there were the following clauses :—" After my son attains

1. (1921) 41 M.L.J. 316 : I.L.R. 44 Mad. 919.

* Appeal No. 561 of 1945. 18th February, 1947.

majority the executors shall hand over to him the remaining moveable and immoveable properties belonging to me . . . . . My son shall enhjoy the same with all power of disposition by way of gift, sale etc."

After the executors had handed over the property to the son on his attaining majority *S* sought to exercise the option given to her to purchase the half share in the house specified in the will. Construing the will,

Held :—What *S* got under the will was an option to purchase from the executors at a fixed price the half share in the house at any time before the executors ceased to function on the transfer of the estate to the son after his attainment of majority. She is not entitled to exercise the option against the son after he has attained majority who under the terms of the will has to get an absolute estate in the property unhampered by any interest created in favour of anybody else.

Appeal against the decree of the District Court of Cuddappah in O.S. No. 1 of 1944.

T. V. Muthukrishna Aiyar for *Ch. Raghava Rao* for Appellant.

K. Krishnaswami Ayyangar for Respondent.

The Judgment of the Court was delivered by

WADSWORTH. J.—One Thayaramma died on the 5th January, 1931 leaving a will dated the 30th December, 1930. Thayaramma had a sister who was the plaintiff in the Court below and two children, the elder being the defendant who is the appellant here and the younger a daughter. Both the children were minors when she died. By the will the paternal aunt of the testatrix one Pedda Venkatasubbamma was appointed executrix along with two others and she was also nominated as the guardian of the minors. The appellant became a major in 1942. He was at that time a ward under the Court and a petition was filed to declare him a major resulting in an order dated the 22nd February, 1943. On the 28th February, 1943 his guardian Pedda Venkatasubbamma handed over the properties to him. On the 24th March, 1943 the plaintiff, sister of the testatrix, demanded the right under the will to purchase the half share of item 3 in " D " schedule which is a house belonging originally to the plaintiff and Thayaramma. The will contemplates the exercise by the plaintiff of a right to purchase this half share for half the original price at which the property was purchased. It is common ground that until March, 1943, after the estate had been handed over to the appellant no indication had been given that the plaintiff wished to exercise this option. She says that she abstained from doing so out of deference to the wishes of her aunt Pedda Venkatasubbamma who was also the defendant's guardian. The trial Judge was not inclined to believe this story in the absence of confirmation. The substantial question in this appeal is whether the option which the plaintiff claimed to exercise was still subsisting in March, 1943.

Thyaramma's will is a somewhat lengthy document not drafted by an expert. The relevant passages may be extracted. After a gift to her daughter of the properties in A and C schedules, the testatrix recites :

" My son Subbarayudu shall enjoy with full powers of gift, sale, etc., the entire property belonging to me other than the moveable and immoveable property given to my daughter Venkatasubbamma as mentioned in the above paragraphs (*i.e.*,) B schedule mentioned jewels, D schedule mentioned lands, houses, etc., E schedule mentioned outstandings and all other moveable and immoveable properties that may be found to belong to me."

Then follow directions for the maintenance of minors, for the collection of debts and the construction of a house in a vacant site. Next comes the following passage :

" If my elder sister Pathi Raguvayya Setti Garu's wife Subbamma is willing to purchase the right to a half share possessed by me in the Mahadi Midde forming item 3 to D schedule out of the immoveable property belonging to me, my executors shall receive from the said Pathi Subbamma half of the amount relating to the deed of sale in respect of the said house obtained by me and the said Pathi Subbamma, sell to her (Subbamma) my right to a half share in the said house, execute a sale deed in her favour and deliver the same after getting it registered. If the said Pathi Subbamma is not willing to purchase the said house, the said house shall be sold in public and my half share of the amount realised thereby shall be kept in deposit in a Government bank or Government bonds shall be purchased with the same or the executors shall advance the amount for interest at a reliable place and augment the same. . . . . ."

Next come certain directions regarding the sale of jewels. Then we have the following sentences :

"Except this, the executor shall not have the right to alienate by way of sale etc. the other immoveable properties belonging to me."

Then come directions relating to repairs of property, the marriages of the son and daughter and we have the following clauses:

"After my son attains majority, the executors shall hand over to him the remaining moveable and immoveable properties belonging to me exclusive of the immoveable and moveable properties given to my daughter as provided above, jewels, amount in cash and the accounts and deliver to him possession of the same. My son Subbarayudu shall enjoy the same with all power of disposition by way of gift, sale, etc. Except my son none others shall have any right whatsoever in it."

It is contended for the defendant-appellant that the will does not create any interest in the property in favour of the plaintiff, that the plaintiff cannot enforce the direction by which she is not bound, there being no mutuality, that there is no gift to the plaintiff, that a mere right to purchase property cannot properly form the subject of a gift, and that if there is an obligation on the part of the executors to sell the property to the plaintiff at a fixed price, this obligation does not continue after the estate has been handed over to the residuary legatee. It has also been argued that if the provision in favour of the plaintiff is to be regarded as an option it must be exercised within a reasonable time. A suggestion has been made that the plaintiff's right would be barred after six years from the date on which the legacy becomes payable under Article 120 of the Limitation Act. On the other hand the respondent has contended that the provision in favour of the plaintiff may be read either as a gift of an option to purchase the property exercisable at any time, subject to the rule against perpetuities or as a trust imposed upon the executors which will not be defeated by the failure of the executors to perform the trust, or alternatively as a gift of the property itself to the plaintiff subject to a condition that she shall pay a stipulated sum. In any case it is contended that there is no question of limitation and that the plaintiff can exercise her option to purchase the property at any time during her lifetime.

The first step to a proper decision of this case is to determine the precise effect of the rather vague language used in the will. We cannot accept the contention of Mr. Muthukirshna Aiyar for the appellant that the first clause granting the properties in "D" schedule to the defendant must be read as a complete disposition of those properties and that the subsequent clause about the sale of item 3 of "D" schedule must be regarded as a mere direction to the executors not affecting the gift. It seems to us clear that reading the will as a whole the intention was to give to the defendant either item 3 of "D" schedule or the sale proceeds thereon. We do not think that the will placed any obligation on the executors to convert item 3 of "D" schedule into cash. It seems to us clear that the will contemplates only two contingencies which would justify the sale. One is the contingency of Subbamma offering to pay half of the original purchase price, *i.e.*, Rs. 4,125, for the acquisition of the half share in the house which forms item 3 of "D" schedule. The other contingency is the contingency of Subbamma being unwilling to purchase the other half share herself, but being willing to have the whole of the property including her own half share sold by the executors. It has been argued by Mr. K. Krishnaswami Aiyangar for the respondent that the words

"If the said Pedda Subbamma is not willing to purchase the said house, the said house shall be sold in public."

should be read as empowering the executors to sell the half share in the house in public for the benefit of the estate. That this is not the intention of the will is clear from the following words which provide that

"my half share of the amount realised thereby shall be kept in deposit."

These words seem to us to establish that the testatrix was contemplating the public sale not of a half share, but of the whole house and was making provision for the safe custody and augmentation of the defendant's half share in the proceeds of such a sale. The will does not seem to contemplate any sale in the event of Subbamma being unwilling to purchase the half share herself or unwilling to join in a sale of the whole house.

Now the next question arises whether the will contemplates any period during which the option by Subbamma should be exercised. Mr. K. Krishnaswami Aiyangar has argued that there is no limit at all other than such limits as may be imposed by the general law and that Subbamma the plaintiff can exercise the option to purchase the other half share of the house at any time during her lifetime, unless perhaps the property has passed to the hands of third parties without notice of her rights. It must, however, be remembered that this provision for the option in favour of the plaintiff forms part of a passage in the will which defines the executor's powers of sale. The passage is closed by the sentence :

"Except this, the executors shall not have the right to alienate by way of sale etc., the other immoveable properties belonging to me."

This will requires the executors to hand over the whole estate as soon as the defendant attains majority and on receiving possession of the estate the defendant is to enjoy it with all powers of disposition by way of gift, sale, etc., and except him no one else is to have any right whatsoever. We do not think that it would be consistent with the clear and forcible language of these clauses of the will to postulate an intention on the part of the testatrix that the defendant on attaining majority should take item 3 of schedule "D" burdened with an option in favour of the plaintiff exercisable at any time during her lifetime to buy the property at a fixed price. We are therefore of opinion that under this will what the plaintiff got was an option to purchase from the executors at a fixed price item 3 of schedule "D" at any time before the executors ceased to function on the transfer of the estate to the defendant after his attainment of majority.

The law on the subject has been clearly summarised in the text books. Halsbury's Laws of England (second edition) Volume 34, paragraph 29, under the Caption "Interests which may be created by Will" runs as follows :

"One form of conditional gift is an option to purchase, or other gift conditional on some consideration being given. A mere option to purchase given to a named donee may be personal to the donee and not transmissible; on the other hand, a gift for named consideration is *prima facie* construed as transmissible to the donee's representative and assigns. . . . . .

The donee must as a rule strictly comply with any terms of the option as to the time of signifying his exercise of the option, time of payment or otherwise. He is entitled on exercising the option to the surplus, after deducting the price, on any sale after the testator's death made on a compulsory purchase or in an action to administer the testator's estate."

Then in paragraph 153 of the same volume in the part entitled "Legal incidents of a gift by Will," we have the following passage :

"Whereas the testator has prescribed a period within which a condition must be performed, this period must be strictly observed subject to the jurisdiction, if any, of the Court to grant relief from forfeiture. If, however, the testator has not prescribed such a period and the condition is one to be performed by the donee personally, not requiring the intervention or concurrence of any other person, the period for the performance of the condition is necessarily the life of the donee and no longer, and the condition is not complied with if the donee dies without having performed it. Where persons other than the donee are to be benefited, the period allowed is, as a rule, a reasonable period."

We have been taken through most of the leading cases on which these passages are based and we are satisfied that this is a correct summary of the law.

The following is a similar passage from Theobald on Wills (9th edition) at page 189 :

"Testators sometimes give options of purchasing a part of their property. Such an option may be personal to the beneficiary or it may be transmissible. If transmissible it must be so limited as not to transgress the rule against perpetuities.

The person to whom the option is given is entitled if he exercises the option to have the property free from incumbrances.

But he must comply strictly with the terms of the option and if the option is to be exercised and the purchase-money paid within a given time, the option will be lost if this is not done, though there may be difficulties in the title or any other circumstance has caused delay."

Applying the rules summarised above to the present facts, we are of the opinion that the plaintiff had under this will an option to purchase item 3 of schedule "D" for a price of Rs. 4,125 exercisable so long as the estate was under the administration

of the executors, but that the will contemplates the cessation of the option at the time when the estate was transferred to the defendant on his attaining majority. The plaintiff not having exercised the option within the time contemplated in the will cannot now claim to exercise it against the defendant who under the terms of that will has to get an absolute estate in the property unhampered by any interest created in favour of anybody else.

The result therefore is that the appeal must be allowed and the suit dismissed. The appellant is entitled to costs throughout.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Ghulam Ghouse Saheb .. *Appellant**

v.

Chowdri D. Raja Rao .. *Respondent.*

Madras House Rent Control Order (XV of 1946) and Transfer of Property Act (IV of 1882), section 116—Tenant directed to give possession—Execution petition for eviction filed by landlord after due date—Payment of rent already due by tenant—No new tenancy created.

The appellant was directed by the House Rent Controller under the provisions of Madras Act XV of 1946 to give possession of the house in which he lived to his landlord, the respondent and on his failing to do so on the due date, the respondent filed on the next day an execution petition for the eviction of the appellant and proceeded with it in spite of the payment by the appellant of rent in respect of the two previous months. It was pleaded in bar of execution that a new tenancy had been created by such payment.

Held, negativing such a contention, that it was not case of a tenant holding over under section 116 of the Transfer of Property Act, but of a person wrongfully remaining in possession beyond the date on which he had been directed to give possession.

Appeal against the order of the City Civil Court, Madras, dated 11th October 1946, in E.P. No. 1108 of 1946 in L. Dis. No. 1347 of 1946 H.R.C.

M. M. A. Kirmani for Appellant.

Messrs. Short Bewes and Co., for Respondent.

The Court delivered the following

JUDGMENT :—The appellant was directed by the House Rent Controllor to give possession of the house in which he lived to his landlord, the respondent, on 8th August, 1946. He did not obey the order and the respondent accordingly filed an execution petition in which he prayed for his eviction. On 3rd September, 1946, however, the appellant paid Rs. 44 to the respondent in respect of two months' rent and obtained a receipt. Having done this he filed a counter affidavit in the execution proceedings in which he maintained that a new tenancy had been created by his payment of the two months' rent so that he was not liable to be evicted. This contention was rejected by the Principal Judge, City Civil Court, Madras, and this appeal is laid against his order. The contention that a new tenancy was created is based on the supposition that the facts and circumstances of the case bring it under section 116 of the Transfer of Property Act. This, however, is not the case. The appellant is not a lessee remaining in possession of the property after the determination of the lease. He is a person wrongfully remaining in possession beyond the date on which he had been directed by the House Rent Controller under the provisions of Madras Act XV of 1946 to give posession to his landlord. No new tenancy was, therefore, created ; and on the facts there seems to be no reason to differ from the conclusion reached by the learned Principal Judge, that the respondent received payment of the rent without undertaking not to evict the appellant. He filed the execution petition for the eviction of the appellant on the day after the date on which the appellant should have given possession, and he proceeded with it in spite of the payment made by the appellant.

The appeal is dismissed with costs.

V.P.S. ——— *Appeal dismissed.*

*Appeal Against Order No. 685 of 1946. 21st February, 1947.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR JUSTICE SHAHABUDDIN.

Addepalli Venkatarama Ayya .. *Appellant**

v.

Sait Khial Dass Topandoss by power of attorney agent Jathanand and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 90—Application under—Nature of—Impleading of auction purchaser if essential—Application after thirty days of the sale to bring on record the auction purchaser—Sustainability.

Applications under rule 90 of Order 21 of the Code of Civil Procedure to set aside a sale of immoveable property in execution of a decree are in effect applications made to the Court pointing out irregularities or fraud in the Court sale. There is nothing in this rule or in any of the rules of Order 21 to show that the auction purchaser should appear in the array of parties as a respondent. The only provision that safeguards the interest of an auction purchaser in this respect is the proviso to sub-rule (2) of rule 92, which is to the effect that no order shall be made unless notice of the application has been given to all persons affected by the sale. The proviso applies not only to applications under rule 89 but also to applications under rule 90. Failure to implead the auction purchaser within the thirty days of the sale is not a fatal defect which will render the application incompetent and a petition for impleading the auction purchaser though filed beyond the thirty days should accordingly be allowed.

Radhakrishna Mahesri v. *Thanukh Mahesri*, (1934) I.L.R. 62 Cal. 286 *and Narayana Sahu* v. *Pentammal*, (1929) 57 M.L.J. 310 : I.L.R. 52 Mad. 861 applied.

Appeal against and petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the orders of the Court of the Subordinate Judge, Bezwada, dated 28th April, 1945 in C.M.P. No. nil of 1945 and 240 of 1945 respectively in O.S. No. 24 of 1939.

G. Venkatarama Sastri for Appellant.

P. Satyanarayana Rao for Respondents.

The Judgment of the Court was delivered by

SHAHABUDDIN, J.—The second defendant in O.S. No. 24 of 1939 in the Court of the Subordinate Judge of Bezwada filed on the 27th January, 1945, an application under Order 21, rule 90 of the Civil Procedure Code to set aside a sale held in execution of the decree in that suit. He alleged that there was no proper publication and that the decree-holder had colluded with one of the defendants and had the properties knocked down for a low price. To this application he did not make the auction purchaser a party. On 3rd April, 1945, he filed a petition for permission to amend the application by impleading the auction purchaser. The learned Subordinate Judge dismissed the application for amendment on the ground that it had been filed beyond thirty days from the date of the sale; and on the same day he dismissed the main application on the ground that the auction purchaser was not made a party to it and that, therefore, the application did not lie. The second defendant has filed this civil miscellaneous appeal against the order dismissing his main application and the civil revision petition against the order dismissing the application for bringing the auction purchaser on record.

It is argued on his behalf that there is no provision in Order 21, requiring an auction purchaser being impleaded in an application under Order 21, rule 90 of the Code. Therefore, the application when it was presented was a valid application and consequently permission should have been granted to make the auction purchaser a party to the application even though it was applied for beyond thirty days. It is also pointed out that the learned Subordinate Judge was not justified in dismissing the application on the ground that the auction purchaser was not a party to it. It is contended that the only requisite with regard to applications referred to in rule 92 is that no order should be passed on those applications unless notice is issued to all persons affected by the sale. In support of these contentions reliance is placed on a Bench decision of this Court in

*A.A.O. No. 476 of 1945 and C.R.P. No. 977 of 1945. 11th April, 1946.

Narayana Sahu v. *Pentammal*[1]. That was a case where an application was made under rule 89 of Order 21, for setting aside a sale. To that application as originally presented the auction purchaser was not a party, and the lower Court dismissed the application presented subsequently for impleading the auction purchaser because it had been filed beyond thirty days from the date of the sale. It was held that the omission to include the auction purchaser till after the expiry of the thirty days allowed for an application under rule 89 was not a fatal defect.

It is contended on behalf of the respondents that this decision does not apply to the case under consideration as here the application was under rule 90. It is further argued that if this decision is considered applicable to the present case it needs reconsideration in view of a decision of the Calcutta High Court in *Bibi Sharefan* v. *Habibuddin*[2], which, it is said, has met with the approval of their Lordships of the Privy Council in *Seth Nanhelal* v. *Umrao Singh*[3].

We have been through these decisions and in our opinion the contentions of the learned advocate for the appellant second defendant, have to prevail and both the appeal and the civil revision petition must be allowed. The fact that the present application was under rule 90 and not under rule 89 does not make any difference as far as the question raised before us is concerned. In our opinion the decision in *Narayana Sahu* v. *Pentammal*[1], is applicable to the facts of the present case. There are no doubt observations in the above mentioned Calcutta case which suggest that an auction purchaser should be impleaded in a petition to set aside the sale, but it does not appear that their Lordships of the Judicial Committee in referring to this decision with approval considered the present question. Rule 90 is to the effect that where an immoveable property has been sold, the decree holder or any person whose interests are affected by the sale may apply to the Court to set it aside on the ground of material irregularity or fraud. It appears to us that applications under this rule are in effect applications made to the Court pointing out irregularities or fraud in the Court sale. There is nothing in this rule or in any of the rules of Order 21 to show that the auction purchaser should appear in the array of parties as a respondent. The only provision that safeguards the interests of an auction purchaser in this respect is the proviso to sub-rule (2) of rule 92, which, is to the effect that no order shall be made unless notice of the application has been given to all persons affected by the sale. This proviso applies not only to applications under rule 89 but also to applications under rule 90. The Calcutta High Court in *Radhakrishna Mahesri* v. *Thanksukh Mahesri*[4], where the application was under Order 21, rule 90, followed an earlier decision of the same Court where it had been held that there being no provision to the effect that an auction purchaser should be arrayed in an application under rule 90 in the corresponding categories of plaintiffs and defendants, to hold that an application without his being so arrayed is not valid would necessitate reading into the proviso of Order 21, rule 92, a mandatory provision, which could have, had the Legislature so intended, been expressly mentioned. We, with respect, agree with this view as well as the view taken by a Bench of this Court in *Narayana Sahu* v. *Pentammal*[1].

We therefore consider that the application as originally made was not incompetent and that therefore the petition for impleading the auction purchaser though filed beyond thirty days should have been allowed. The civil revision petition is allowed with costs. The order of the lower Court dismissing the main application is set aside, and that application will be disposed of on the merits according to law. The civil miscellaneous appeal is allowed. The costs in this Court will abide the result.

K.S. *Appeal and petition allowed.*

1. (1929) 57 M.L.J. 310 : I.L.R. 52 Mad. 861.
2. (1911) 15 C.W.N. 685.
3. (1930) 60 M.L.J. 429 : L.R. 58 I.A. 50.
4. (1934) I.L.R. 62 Cal. 286.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE HAPPELL.

R. M. P. R. M. M. Subramaniam Chettiar and others .. *Petitioners**

v.

Navaneethakrishna Marudappa Thevan and another .. *Respondents.*

Privy Council—Practice—Appeal admitted—Records printed in India and transmitted to Privy Council and received there—Financier of one of the parties who though impleaded in all the proceedings remaining ex parte *throughout—If can apply to the High Court in India to be added as party to appeal pending before His Majesty in Council.*

Where an appeal to His Majesty in Council has been admitted, (the records having been printed in India and transmitted to the Privy Council and received there, though not formally lodged) the Privy Council has seisin of the appeal and hence an application by a financier who had remained *ex parte*, though impleaded in all the proceedings, and his sons to be added as party respondents to the appeal before the Privy Council will not lie to the High Court from which the appeal went up to the Privy Council.

Even for substitution of a legal representative of a deceased party after the records have been despatched, the application itself is not dealt with by the High Court. It merely enquires into and expresses findings of fact upon which it reports and that report is sent to the Judicial Committee for that tribunal to dispose of the application.

Petition presented under rule 119 of the Rules of the High Court, Appellate Side and rule 14 of the Judicial Committee Rules, 1920, praying that in the circumstances set forth in the affidavit filed therewith, the High Court will be pleased to direct the addition of petitioners herein abovenamed, *viz.*, R. M. P. R. M. M. Subramaniam Chettiar and others as party respondents in P. C. C. M. P. No. 417 of 1945 wherein leave was granted to the petitioner therein to appeal to His Majesty in Council against the final order of the High Court dated 24th October, 1944, in A. A. O. No. 303 of 1942, preferred against the order of the District Court, Tinnevelly, dated 28th February, 1942, in E. P. No. 32 of 1935 in O. S. No. 2 of 1922.

A. Sundaram Aiyar for Petitioner.

R. Purushothama Aiyangar, T. Aravamuda Aiyangar, S. Ramaswami Aiyar and *N. Subramaniam* for Respondents.

The Order of the Court was made by

The Chief Justice.—In this civil miscellaneous petition the applicants seek to be made parties to an appeal now pending before His Majesty in Council. The first applicant was a party to all the proceedings which have now eventuated in the appeal to the Judicial Committee, but throughout he entered no appearance, and remained *ex parte*. He appears to have been a financier of one of the parties in the litigation and his present object is to obtain more moneys in addition to what he has already received as consideration for financing the litigation. The other applicants are his sons.

The appeal was admitted nearly three years ago. The records were printed in India, were transmitted to the Privy Council in December, 1946, and were received there on the 17th January, 1947, as evidenced by a letter of that date from the Registrar of the Privy Council to the Registrar of this Court acknowledging the receipt of the records of the proceedings and stating that the appeal has been registered as Privy Council Appeal No. 10 of 1947.

It is in those circumstances that the application is made to this Court to add the petitioners as parties to the appeal which has now reached the Judicial Committee, even if the petition of appeal has not been formally lodged.

Learned Counsel for the applicants was unable to indicate any rule or any authority which lends support to this application being made after the records have been transmitted to England and after they have been received and acknowledged by the Privy Council. Reference during the argument was made to *Haidar*

*C.M.P. No. 835 of 1947. 19th March, 1947.

Ali v. *Tasaduk Rasul: Ex parte Haider Ali*[1], a decision of the Judicial Committee in 1888. In that case, there had been a change in a party to the appeal either by death or by alteration of status requiring a representative to be brought on record to represent the original party. Their Lordships of the Judicial Committee observed that evidence being required as to the representative character of the person alleged to occupy that position, such evidence should be obtained in India and transmitted to the Judicial Committee. Another case referred to was *Jadunandan Koer* v. *Ramjiban Lal*[2]. There, an application was made to the High Court at Calcutta in a pending appeal to the Judicial Committee, the records of which had not been transmitted to England, for substitution by reason of the death of a party or a change in status. Following a number of decisions, to which reference was made, the opinion was expressed that the Court had authority in that case since the records had not been transmitted.

Rules 13 and 14 of the Judicial Committee Rules of 1920 provide for substitution of representatives of parties in an appeal to the Privy Council before the records have been transmitted and after that has taken place. Rule 14 provides that where, subsequent to the despatch to England of the record, it becomes defective by reason of death, or change of status, of a party to the appeal, the Court from which the appeal is proceeding may, on the application of a person interested, cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted or entered on the record, in place of, or in addition to, the party who has died, or undergone a change of status. It is clear that where an application is necessary for substitution of a party after the record has been despatched, the application itself is not dealt with by the Court. It merely enquires into, and expresses findings of, fact upon which it reports, and that report is sent to the Judicial Committee for that tribunal to dispose of the application. In the present instance a finding of fact is not required to be certified by this Court. If there was a general right for an application of the present sort to be made, there must also be an equal right with regard to substitution of legal representatives, and there would have been no need for either rule 13 or rule 14 of the Judicial Committee Rules of 1920.

Reliance for the present application was sought to be placed on rule 119 (1) of the Appellate Side Rules of this High Court. All that that rule provides is that any supplemental record dealing with the addition of a party shall be transmitted to the Registrar of the Privy Council in manuscripts instead of being printed. The effect of that rule is to excuse the printing of any supplemental record, and it provides for nothing else.

There can be no doubt that when the records reach the Privy Council, the Board has seisin of the appeal. Firstly, the appeal is given a number, in this case No. 10 of 1947. Secondly, pursuant to rule 34 of the Judicial Committee Rules, 1925, unless the appellant takes steps to prosecute the appeal within four months of the receipt of the records by the Judicial Committee, the appeal shall be dismissed. The appeal itself could not be dismissed unless the Judicial Committee had cognizance of it. Intimation of the consequences of non-prosecution is expressed in the letter from the Registrar of the Privy Council dated 17th January, 1947, to which reference has already been made.

In the absence of any authority either by way of a rule or decision expressed in any case, in my opinion, the present application does not lie to this Court; and for that reason and for those previously expressed, in my view, it should be dismissed with costs.

Happell, J.—I agree.

K.S. ——— *Petition dismissed.*

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1. (1888) L.R. 15 I.A. 209 : I.L.R. 16 Cal. 184 (P.C.).
2. (1908) 4 I.C. 454.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Karumuri Venkataratnam, *In re* .. *Petitioner**

Penal Code (XLV of 1860), section 504—Ingredients of offence under—Use of abusive words—Mere finding that abusive words were used without setting out those words—Conviction not sustainable.

To support a conviction under section 504 of the Penal Code there should be (*i*) an intentional insult and (*ii*) the offender should have by such insult given provocation to any person intending or knowing it to be likely that such provocation will cause the latter to break the public peace or to commit any other offence. Where the act alleged to amount to intentional insult is the use of abusive words, it would be necessary to know what those words are in order to decide whether the using of those words amounted to intentional insult.

Where the Bench Magistrates in convicting the accused had not set out the abusive words in their judgment but were merely content with finding that the accused had abused the complainant,

Held, that the conviction cannot be upheld because that finding was not sufficient by itself to warrant a conviction under section 504, Indian Penal Code.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the First Class Bench Magistrates, Rajahmundry, dated 29th December, 1945, and passed in Full Bench Case Nos. 804 and 805 of 1945.

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* and *K. Narayanaswami* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been convicted by the first Class Bench Magistrate, Rajahmundry, under section 504, Indian Penal Code, and sentenced to pay a fine of Rs. 25. He is said to have sold on the previous day some tobacco to the complainant. Next day the complainant came to the petitioner and without paying him the money removed the tobacco. This infuriated the petitioner and the petitioner is said to have used abusive words which provoked the complainant to beat him. It is also urged by the complainant that the petitioner besides abusing threatened to strike him with a knife ; but the Magistrates did not accept that part of the case. They found, however, that the accused did abuse the complainant for the non-payment of his dues and for removing the produce without payment and this abuse brought about the breach of the peace.

This finding is not sufficient to support the conviction under section 504, Indian Penal Code. That section requires firstly that there should be an intentional insult, and secondly that thereby the offender should have given provocation to any person intending or knowing it to be likely that such provocation will cause him to break the public peace or to commit any other offence. One of the essential elements constituting the offence is that there should have been an act or conduct amounting to intentional insult. That act in this case being the use of abusive words, it would be necessary to know what those words were in order to decide whether the using of those words amounted to intentional insult. The judgment of the Bench Magistrates does not set out those words, and in the absence of those words it is not possible to decide whether the ingredient of intentional insult is present in this case. The Magistrates were content with finding that the petitioner abused the complainant, but that is not sufficient by itself to warrant a conviction under section 504, Indian Penal Code.

For these reasons the conviction of the petitioner cannot be maintained. The petition is allowed and the conviction and sentence are set aside.

V.P.S. ——— *Petition allowed.*

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*Crl.R.C. No. 701 of 1946. 7th March, 1947.
(Crl.R.P. No. 670 of 1946.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

The Western India Oil Distributing Co., Ltd., through its local agent, Madras .. *Appellant**

v.

V. K. Rathnasabapathy .. *Respondent.*

Limitation Act (IX of 1908), Articles 89 and 145—Principal providing his agent with petrol pump, tank and accessories for selling petrol during the continuance of the agency—If "deposit" within meaning of Article 145—Claim for return of the property—Limitation.

Where a petrol pump and tank is provided by the principal to the agent for the sale of petrol to be returned on the termination of the agency, the cause of action for the return of the pump, tank and accessories arises on the termination of the agency, and Article 89 of the Limitation Act applies and a suit instituted beyond three years after the cause of action arose will be barred. Article 145 cannot have any application to such a case even if it is assumed that the delivery of the pump, tank, etc., was a 'deposit'. The cause of action and the right to sue first arose when the business between the parties ceased or the agency terminated and not on the date when they were delivered to the agent.

Appeal under Clause 15 of the Letters Patent against the judgment and decree of Chandrasekhara Aiyar, J., dated 15th August, 1946, in C. C. C. A. No. 68 of 1945, preferred to the High Court against the decree of the City Civil Court, Madras, in O. S. No. 327 of 1943.

V. Radhakrishnayya, K. K. Pocker, N. Narasimham, N. Ramakrishnayya, M. A. Ghatala and *I. A. Salam* for Appellant.

G. Chandrasekhara Sastri for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is a Letters Patent Appeal against the judgment of Chandrasekhara Aiyar, J., who reversed the decision of the learned Additional Second Judge, City Civil Court, decreeing the appellants' (plaintiffs in the suit) claim for the return of a petrol pump and tank or Rs. 2,900 its value. Since, prior to the suit, the respondent, (defendant in the suit), alleged he had purchased the pump from the appellants there was a claim in the alternative, for the price. At the trial, and also at the hearing before Chandrasekhara Aiyar, J., the ownership of the petrol pump was asserted by the respondent. Both Courts held against this contention; there is no appeal by the respondent and no notice of cross objections has been given by him. Consequently the finding regarding the appellant's ownership is conclusive. The learned Additional Second Judge held the suit was not barred. Chandrasekhara Aiyar, J., found to the contrary and this is the plaintiffs' appeal against his decision dismissing the suit.

The sole point for consideration is whether the claim is barred by the Limitation Act.

The material facts are :—By an agreement in writing between the parties dated 19th October, 1933, the appellants appointed the respondent their selling agent for petrol in the Kolar Gold Fields area. In October, 1934, the appellants supplied the respondent with a petrol pump, tank and accessories ; they paid the cost of installation at the respondent's premises and he paid them Rs. 1,000 as security for the apparatus and for its return to the appellants. The agency agreement was terminated in 1936 but the respondent retained the pump. About the end of that year he made some business arrangement with one Vanagangappa Setty for continuance of the petrol station; according to the appellants' evidence, Vanagangappa Setty became their agent and from their letter to the respondent dated November 6, 1936, it appears they were agreeable that the pump should be sold to Vanagangappa Setty. He did not buy it and in August, 1937, the arrangement between Vanagangappa Setty and the respondent came to an end, and, if he was ever in that position, the former ceased to be the appellants' selling agent. On

*L.P.A. No. 93 of 1946. 14th March, 1947.

May 4, 1938, the appellants wrote to the respondent recording that he had expressed a desire to hand over the pump to them and enquiring when they should send a representative to take possession. The respondent replied by letter dated May 21, 1938, denying he had promised to return the pump and stating that their letter of November 6, 1936, was to the effect that the pump could be transferred to Vanagangappa Setty, and, as such, the transfer to them did not arise. On May 26, 1938, the appellants wrote to the respondent that the pump was given to him as a trust to sell their petrol and, if he failed to hand it over immediately, they would take it that he was making a breach of trust in not returning the property to them when asked to do so. On June 29, 1939, the appellants' advocate wrote to the respondent calling for immediate delivery of the pump and other accessories. No notice was taken of the last two letters and the pump was not returned. In execution of a decree obtained against the respondent by one Ramiah, the pump was sold in August, 1941, at a Court auction and purchased by Ramiah for Rs. 1,800; at the end of 1942 the respondent repurchased it from Ramiah at the same price. Later he sold it to the Mysore Government for Rs. 2,900. On March 6, 1943, the appellants' advocate again wrote to the respondent, calling upon him to restore and arrange for the return of the pump and outfit forthwith. There was no reply to, and no compliance with, this demand and the suit was instituted on April 20, 1943.

As above stated, the learned trial Judge decreed the suit; he directed the return of the pump within fourteen days and in default of its delivery, payment of its value, Rs. 2,900, the appellants to give credit for the sum of Rs. 1,000, the amount of the security deposit. As regards limitation, the learned Judge appears to have come to the conclusion that the respondent was a trustee of the pump and that section 10 of the Limitation Act applied so that no period of limitation ran against the appellants. In appeal Chandrasekhara Aiyar, J., held that section 10 did not apply, that either Article 49 or Article 89 applied, the claim was barred and he allowed the appeal and dismissed the suit.

With regard to section 10: In a series of cases, of which the *Official Receiver of South Arcot* v. *Kulandaivelu Chettiar*[1], is the last, it has been held that the section does not apply when the property does not vest in the individual sued. In the present instance it is common ground that the property in the pump did not vest in the respondent, but, throughout, the appellants remained the owners of it; Mr. Radhakrishnayya, for the appellants, very properly drew our attention to this line of cases but he did not pursue the contention regarding the applicability of section 10.

Mr. Radhakrishnayya contended that Article 145 applies to the suit. That Article provides as follows :—

Description of suit.	Period of limitation.	Time from which period begins to run.
Against a depositary or pawnee to recover moveable property deposited or pawned.	30 years	The date of the deposit or pawn.

The argument was put thus: The delivery in 1934 of the pump by the appellants was a "deposit" with the respondent who was the depositary; the suit was to recover the pump and the period of limitation commenced to run from the date of the deposit and it had not expired when the suit was instituted in 1943. Consequently the suit is not barred.

1. (1946) 1 M.L.J. 31 : I.L.R. (1946) Mad. 429.

In *Mulla Veettil Seeti Kutti* v. *Kunhi Pathumma*[1], Abdur Rahim, J., observed at page 1053 of the report, that

> "It is a well-known rule for construing the Indian Statute of Limitation that we must read the first and third columns together."

The article will apply only if the facts fall within both those columns, if only one column covers the facts, then the article will not apply. I will assume, for the purpose of the present consideration, that the delivery of the pump to the respondent was a "deposit" within column 1 of Article 145. That column gives the nature or description of the suit to which the article applies; column 3 gives the time specified in column 2, from which the limitation period begins to run and when the right to sue commences. If Article 145, applies in the present instance the appellants must have had the right to sue for recovery of the pump from date when it was delivered to the respondent. Unless they had that right, section 145 cannot be applicable.

To have the right to sue from the inception, the appellants must have had the right to demand and to have immediate possession of the pump at any time from and after the date when it was delivered to the respondent.

Clause 20 of the agency agreement provides that: On the termination of the agreement the respondent shall hand over to the appellants all tools, accessories and other articles which may have been entrusted by the appellants to the respondent. The agreement does not require the respondent to return those things at any time earlier than its termination.

Whilst there is no express provision in the agreement for the appellants to entrust those things to the respondent, since clause 20 provides for their being handed over at the termination of the agreement, it contemplates such entrustment. The things which are contemplated to be entrusted are adjuncts to the sale of petrol. A petrol pump and tank is clearly "an accessory or other article" and is an adjunct to such sale. If there had not been the agency agreement between the parties, the pump would not have been entrusted, or supplied, to the respondent by the appellants and it is one of the things which the agreement contemplates being supplied and which the respondent was under obligation to return at the termination of the agreement.

It is instructive to examine how the appellants themselves viewed the position. Their advocate's letter dated March 6, 1943, states that the pump, tank and accessories to the pump outfit were supplied to enable the respondent, as the appellants' dealer, to carry on business in the sale and distribution of petrol and against the supply the respondent paid a deposit of Rs. 1,000 returnable to him on the return of the pump and outfit in good and workable condition after conclusion of the business. It appears from this letter, that the respondent's obligation to return the pump did not arise while the business relationship existed between the parties, and, it must follow, that the appellants had no right to demand return of it until the conclusion of that relationship, that is to say, when the agency agreement terminated.

Reference to the plaint can now be made to ascertain how the appellants put their case for the return of the pump. In paragraph 4 it is pleaded that it was also agreed between the parties that, in order to facilitate, and for the purpose of, the sale of petrol to be supplied by the appellants, the respondent should be supplied with a petrol tank and pump belonging to the appellants; as part of that arrangement the respondent agreed to deposit a sum of Rs. 1,000 with the appellants as security for the proper care and maintenance of the tank and pump and for its due return at Madras in a sound condition at his own expense at the termination of the agency or whenever called upon by the appellants in the exigencies of their business or when business with respondent ceased for any reason. There is no plea

1. (1917) 33 M.L.J. 320 : I.L.R. 40 Mad. 1040 (F.B.).

that the appellants were entitled to possession or return of the pump from the date when it was supplied to the respondent.

According to this plea there was a separate agreement for the supply of the pump, which was for the purpose of and to facilitate, the sale of the appellants' petrol. The respondent was not obliged to return the pump save in one of three events, upon the happening of which his obligation first arose. Consequently, he had the right to retain it until one of those events occurred. During the subsistence of the agency, or the agreement, the appellants could demand its return but only when such demand was justified by the exigencies of their business; until that contingency arose no demand for return could be made; in the absence of a contingency giving rise to a right to demand return of the pump the respondent was entitled to retain it until the termination of the agency with the appellants or the cessation of the business with them. The appellants had not an unqualified right to immediate possession of the pump and had not an unqualified right of suit for its recovery from the date when it was delivered to the respondent; the right to possession and the right of suit accrued upon the happening of one of the events, abovementioned when the cause of action first arose.

For Article 145 to have application there must have been an unqualified right to sue for the return of the pump, from the moment when it was "deposited" with the respondent. The cause of action and the right to sue first arose when the business between the parties ceased or the agency agreement terminated in 1936, some two years after the pump was supplied to the respondent. In those circumstances the suit for the recovery of the pump does not fall within column 3 of the article.

In *Ram Rambijay Prasad Singh* v. *Mt. Bachia Kuari*[1], the excutors of an employee sued the employer for the return of money deposited by the deceased as security for good conduct. The security was not returnable while the employment continued. It was held that Article 145 did not apply as no cause of action arose at the date of the deposit. In his judgment Wort, O.C.J., observed:

"The Limitation Act provides for time running only after the cause of action has arisen."

With respect I agree with the above decision and observation.

Further, other facts and circumstances negative a right of suit from inception of the supply of the pump and tank. It was installed in the respondent's premises where the tank was embedded in the ground. There could not have been an intention that as soon as the installation was complete, the appellants should have a right of immediate return of it.

In my opinion, whether the pump was supplied to the respondent pursuant to the agency agreement or pursuant to a separate agreement, as pleaded in the plaint, Article 145 does not apply to the appellants' suit for its recovery.

The respondent was the appellants' agent to sell their petrol. The pump was supplied to him for that reason and to facilitate his sale of the appellants' petrol. It is beyond doubt, in my view, that the pump was received by the respondent as agent for his principals, the appellants. His duty was to account to his prinpals for the pump by returning it to them at the termination of his agency in 1936. Article 89, so far as material, provides that a suit by a principal against his agent for moveable property received by the agent, and not accounted for, shall be instituted within three years from the termination of the agency. The respondent did not return the pump to the appellants, and, thereby, he failed to account to them for it. The suit was for the return of the pump and, in the alternative, for payment of its value, which are claims against the respondent to account for the moveable property which he had received from the appellants as their agent. In my view the suit, clearly, is one to which Article 89, applies; the cause of action arose in 1936 and, when the suit was instituted in 1943, it had become barred by limitation.

1. A.I.R. 1939 Pat. 688.

On behalf of the respondent it was contended further that Article 49 applies. It was pointed out that the respondent failed on two occasions to comply with the appellants' demands for return of the pump, which demands are contained in their letters dated May 28, 1938 and June, 29, 1939; it was also argued that the appellants' letter dated 4th May, 1938, was another demand for the return of the pump, which demand was expressly refused by the respondent's letter dated 21st May, 1938. It was contended that the above failures and refusal to return the pump to the appellants each created a cause of action for which a suit lay on the dates thereof, all of which causes of action arose more than three years prior to the institution of the suit out of which this appeal arises; in those circumstances, Art. 49 applies and by which the suit has become barred.

Since I have come to the conclusion that Article 89 applies and it bars the suit, consideration of the question of the application of Article 49 is unnecessary.

Mr. Radhakrishnayya for the appellants and Mr. Srinivasa Aiyangar for the respondent addressed arguments at length to us regarding the nature of supply of the pump and whether it was a "deposit" within Article 145. Many reported cases in this and other High Courts were cited by each learned Counsel in which it was discussed whether the word "deposit" in the articles is used in its wider sense, namely, a bailment of moveable property by one person to another in every circumstance, or whether it has the narrower meaning of "depositum" of the Roman Civil Law and excludes other forms and bailment, *e.g.*, "mandatum", "commodatum" and "locatio operis faciendi", as expressed in the same Code of law. Those cases are peculiarly conflicting, many of the opinions in the judgements are *obiter dicta* and not authoritative decisions. Since it is unnecessary for the purpose of the present appeal to give a finding upon the meaning of "deposit" in Article 145, and if an opinion were expressed it would do no more than add futher *obiter dictum* to the existing collection, I do not propose to discuss the question. Nevertheless, one is appreciative of the able arguments upon the subject which were addressed by learned Counsel.

In my opinion and for the reasons given, this appeal should be dismissed with costs.

Patanjali Sastri, J.—I agree.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Narayanaswami Mudali .. *Petitioner**

Kerosene Control Order, (1942), *rule* 12—*Defence of India Rules,* (1939), *section* 81 (4)—*Sale of one tin of Kerosene—Seller, if constituted retail dealer—Transaction, if a business.*

Where the only evidence was that the petitioner conducted a solitary transaction of sale of one tin of kerosene,

Held, that it would not constitute the petitioner a retailer nor would it constitute the transaction a business to amount to his carrying on business as retail dealer within the meaning of clause 12 of the Kerosene Control Order, 1942. Carrying on a business always connotes conducting of more transactions than one by way of trade or commerce and the concept of a dealer also has in it implicit the notion that he carries on transactions of purchase, sale or distribution as a business.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Sessions, North Arcot Division at Vellore, dated 15th March, 1946, and passed in Criminal Appeal No. 14 of 1946, preferred against the judgment of the Court of the Additional First Class Magistrate of Ranipet, in C.C. No. 123 of 1945.

A. Nagarajan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

*Crl.R.C. No. 725 of 1946.
(Crl.R.P. No. 694 of 1946). 28th November, 1946.

The Court made the following

ORDER.—The petitioner has been convicted of an offence under section 81 (4) of the Defence of India Rules for violating clause 12 of the Kerosene Control Order, 1942, which prescribes that no person shall carry on business as a retail dealer unless he has been registered as such under the Kerosene Control Order by the Collector having jurisdiction over the place where the retail dealer carries on business. A dealer has been defined in the Control Order itself as a person dealing in the purchase, sale or distribution of kerosene. In the present case the only evidence is that the petitioner conducted a solitary transaction of sale of one tin of kerosene but that does not constitute him a retailer nor does it constitute the transaction a business to amount to his carrying on business as retail dealer within the meaning of clause 12. Carrying on a business always connotes conducting of more transactions than one by way of trade or commerce and the concept of dealer also has in it implicit the notion that he carries on transactions of purchase, sale or distribution as a business and both these expressions exclude the idea of a solitary transaction of purchase or sale constituting either a business or constituting the person making the sale a retail dealer. The petition is allowed and the conviction is set aside and the fine if paid will be refunded.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

S. Komarappa Goundan .. *Petitioner**

v.

S. Ramaswamy Goundan .. *Respondent.*

Civil Procedure Code (V of 1908), sections 151 and 10—Inherent power of High Court to stay trial of independent suit in the course of proceedings pending before it—Conditions to be satisfied—Section 10—" The matter in issue "—Meaning.

The High Court in the exercise of its inherent jurisdiction can stay the trial of an independent suit in the course of the proceedings pending before it if (*i*) it is in the interests of justice or to prevent abuse of process of the Court and (*ii*) there is no other remedy available to the applicant.

As the words " the matter in issue " in section 10, Civil Procedure Code, have to be deemed to denote the entire subject in controversy, relief under that section would not be available where the facts in the two suits are not common except only with regard to one matter in issue.

Balaji Rao v. *Natesa Chetty*, (1947) 1 M.L.J. 330, followed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing stay of trial of O.S. No. 32 of 1946, Subordinate Judge's Court, Salem, pending S.A. No. 2081 of 1946 preferred to the High Court against the decree of the District Court, Salem, in A.S. No. 170 of 1945 preferred against the decree of the Court of the Subordinate Judge, Salem, in O.S. No. 38 of 1943.

S. Thyagaraja Aiyar for *K. V. Ramachandra Aiyar* for Petitioner.

T. R. Ramachandran for *K. S. Desikan* for Respondent.

The Court made the following

ORDER.—This is an application for stay of the trial of O.S. No. 32 of 1946 on the file of the Sub-Court, Salem, pending the disposal of S.A. No. 2081 of 1946 of this Court. In the counter filed by the respondent an objection was taken that the application is not maintainable as there is no appeal in this Court with reference to any proceeding in the suit sought to be stayed. I have examined this aspect of the matter in my judgment in *Balaji Rao* v. *Natesa Chetty*[1], and relying on a number of cases cited therein I have come to the conclusion that if certain conditions

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*C.M.P. No. 6033 of 1946. 26th March, 1947.

1. (1947) 1 M.L.J. 330.

are satisfied there can be no question that the trial of an independent suit can be stayed by this Court in the exercise of its inherent powers under section 151 of the Code of Civil Procedure in the course of other proceedings pending before it. The conditions to be satisfied would be firstly the two pre-requisites mentioned in section 151 of the Code itself, namely, that the stay has to be ordered in the ends of justice or to prevent abuse of the process of the Court; the other condition would be that the applicant for stay has no other remedy available to him in law which he can seek from a competent Civil Court. I have pointed out in that judgment that if the applicant can get the particular suit stayed under section 10 of the Code it would be incumbent upon him to adopt that course before invoking the inherent jurisdiction of this Court under section 151. In the present case what is urged by the learned counsel for the respondent is (although this point was not directly or indirectly raised in the counter) that O.S. No. 32 of 1946 is a later suit and consequently an application could be made in the Sub-Court, Salem, for its stay under section 10 of the Code. It is admitted that this is a later suit but it is argued by the learned counsel for the petitioner that section 10 would not be applicable to the present case as the facts in the two cases are not common except only with regard to one matter in issue relating to the partition of 1938. The premises on which this argument is based are not denied; and it follows having regard to the decisions which I shall presently refer to, that section 10 of the Code cannot apply to such a case.

It has been held in a long series of cases of this Court that the words "the matter in issue" in section 10 should be deemed to denote the entire subject in controversy. Venkatasubba Rao, J., in *Sreeramulu* v. *Sreeramulu*[1], Srinivasa Aiyangar, J., in *Kunnamangalath* v. *Koman Nair*[2] and Curgenven, J., in *Vellachami* v. *Muthiah Chetti*[3], enunciated this position differing from the Calcutta decision in *Sm. Jinnat Bibi* v. *Howrah Jute Mills Co., Ltd.*[4], which was a decision of a single Judge who had failed to notice an earlier Calcutta decision in *Bepin Behari* v. *Jogendra Chandra*[5]. The earlier Calcutta decision was followed in the earliest of the Madras cases referred to above in *Sreeramulu* v. *Sreeramulu*[1]. All these cases were again reviewed by Walsh, J., in two judgments both of which are reported in the same volume, *Murugesa* v. *Balasundarammal*[6] and *Mahaganapathi* v. *Natesa Aiyar*[7]. The learned Judge pointed out that the use of the definite article "the" in "the matter in issue" in section 10 suggests that the rule will not apply where only "a matter in issue is common".

The only other question remaining to be considered is whether it is in the interests of justice to stay the trial of O.S. No. 32 of 1946. An important question in the litigation is about the genuineness of the release deed whose foundation is the alleged partition of 1938; and the question of the release and of the partition deed is undoubtedly common to both the cases. I therefore consider that it is in the interests of justice to stay the trial in O.S. No. 32 of 1946 on the file of the Sub-Court of Salem, as to a very large extent the disposal of the appeal one way or the other here will have an important bearing upon the material questions at issue in the suit sought to be stayed.

The petition is ordered.

V.P.S. *Petition allowed.*

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1. A.I.R. 1922 Mad. 304.
2. (1924) 48 M.L.J. 251.
3. A.I.R. 1927 Mad. 1132.
4. A.I.R. 1932 Cal. 751.
5. A.I.R. 1917 Cal. 248.
6. A.I.R. 1935 Mad. 24: (1934) 67 M.L.J. 748.
7. A.I.R. 1935 Mad. 112.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Appavoo Pillai .. *Petitioner.**

District Police Act (XXIV of 1859), sections 47 and 53—Scope and applicability of—Private person complaining against police officer for perfunctory discharge of duty—Complaint found baseless—Prosecution of the complainant by police under section 47—Applicability of section 53 to the case.

A private person complained against a police officer alleging that he did a certain investigation in a perfunctory manner, upon which an inquiry was held and the complaint was found to be baseless. Thereafter the police took action against the complainant under section 47 of the District Police Act. It was pleaded in defence that the prosecution was barred under section 53 of the District Police Act as it was beyond three months of the act complained of.

Held, that section 53 of the Act had no application to cases of this kind. The section applies to those actions and prosecutions which are taken against persons for anything done or intended to be done either under the provisions of the District Police Act or under the provisions of any other law for the time being in force conferring powers on the police. The actions and prosecutions contemplated under the section are those instituted against the police for acts done in the discharge of police duties.

Held further, that the place from where the communication by the private person containing charges against the police was posted is a place where the complaint under section 47 could be filed.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Session of Trichinopoly division, dated 5th October, 1946, in Crl. R.P. No. 21 of 1946 (C.C.No. 1396 of 1946, Sub-Magistrate's Court, Lalgudi).

P. Chandra Reddi and *R. Rangachari* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The first contention put forward by Mr. Chandra Reddi in this case for the defence is that the prosecution is barred under section 53 of the District Police Act as it was beyond three months after the act complained of. The act complained of was that the police officer conducted the investigation in this particular case in a perfunctory manner. This complaint was made in a communication that was addressed by the petitioner to the District Superintendent of Police, Trichinopoly. On the wrapper it was superscribed to the Inspector General of Police, Madras, and was received at Madras and transmitted to the District Superintendent of Police who in his turn sent it to the Police Inspector who after enquiry found that the allegations against the police officer were baseless. Upon this report action was taken against the petitioner under section 47 of the District Police Act which provides :

> "If any person shall assault or resist any police officer in the execution of his duty, or shall aid or incite any other person so to do, or shall maliciously and without probable cause prefer any false or frivolous charge against any police officer, such person shall, on conviction of such offence before any Magistrate, be liable to a fine not exceeding fifty rupees . . . . ."

The complaint was first filed before the Sub-Magistrate, Musiri. That Sub-Magistrate transferred the case to the file of the Sub-Magistrate, Lalgudi. The matter came up to this Court in criminal revision case No. 984 of 1945 on the question as to whether that Court had jurisdiction. The petition was dismissed, holding that the Court in Trichinopoly (Lalgudi) had jurisdiction and that prosecution need not be instituted in Madras as was contended. The District Magistrate, Trichinopoly, appears to have subsequently withdrawn the case to his file and again re-transferred it to the file of the Sub-Magistrate, Lalgudi, for disposal.

The point raised under section 53 of the District Police Act is that the order of the District Magistrate withdrawing the case to his file and transferring it to the Sub-Magistrate, Lalgudi, was beyond three months after the act complained of and that therefore the prosecution is barred by time. I find no force whatever

* Crl. R. C. No. 1309 of 1946. 26th March, 1947.
(Crl. R. P. No. 1249 of 1946).

in this contention. Section 53 has no application to cases of this kind. It applies to those actions and prosecutions which are taken against persons for anything done or intended to be done either under the provisions of the District Police Act or under the provisions of any other law for the time being in force conferring powers on the police. It cannot be said that the petitioner is a person who did anything or intended to do anything under the provisions of the District Police Act or under the provisions of any other law conferring powers on the police. The remaining provisions of section 53 also distinctly indicate that the actions and prosecutions contemplated under section 53 are those instituted against police officers for acts done in the discharge of their police duties.

The next argument is that Lalgudi Court had no jurisdiction whatever and that the District Magistrate by withdrawing it to his file could not confer such jurisdiction. The learned Public Prosecutor points out that the letter addressed to the District Superintendent of Police was posted by the petitioner at Tiruvasi which is within the limits of Lalgudi Sub-Magistrate's jurisdiction and for defamation the place of posting is one of the places where the complaint can be filed, because it is the commencement of the process of publication. I find no substance whatever in the petition.

The petition is accordingly dismissed.

K.C. — *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Thanikachala Mudali and others .. *Petitioners**

v.

Ponnappa Mudali .. *Respondent.*

Criminal Procedure Code (V of 1898), section 436, Proviso—Dismissal of complaint—Discharge of accused under section 259—Fresh complaint—Dismissal after recording the sworn statement of complainant—Further enquiry ordered in revision without notice to accused—Legality.

After some of the prosecution witnesses were examined, a complaint of defamation was adjourned and on the adjourned date it was dismissed as the complainant was said to be absent and the accused were discharged under section 259, Criminal Procedure Code. A fresh complaint was preferred but the trial Magistrate dismissed it after recording the sworn statement of the complainant. The Sessions Judge in revision set aside the order of dismissal and directed the restoration of and further enquiry into the complaint without any notice to the accused. On a contention in revision that notice to the discharged accused was necessary before an order for further enquiry could be made,

Held, that the proviso to section 436, Criminal Procedure Code, only directs notice in the case of "any person who has been discharged" and not in the case of a person to whom no process has been issued and when the complaint has been dismissed without notice to him. Hence the order of the Sessions Judge was right.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Session of North Arcot division at Vellore in Crl.R.P. No. 8 of 1946, dated 9th August, 1946 (C.C. No. 9 of 1946, Additional First Class Magistrate, Ranipet).

D. Munikanniah and *S. Vaidhyanathan* for Petitioners.

P. Krishnamachari for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The facts of the case out of which this revision petition arises are very simple and are fully set out in the judgment of the learned Sessions Judge. The petitioners were the accused in C.C. No. 162 of 1945 on the file of the Additional First Class Magistrate, Ranipet. That was a case brought by Ponnappa Mudali

* Cr. R. C. No. 1060 of 1946. (Cr. R. P. No. 1014 of 1946). 21st March, 1947.

charging the accused with having defamed him. After four prosecution witnesses were examined the case stood posted to 24th January, 1946, for the examination of the rest of the prosecution witnesses. When the case was called on that date, the complainant was said to be absent and the accused were discharged under section 259 of the Code of Criminal Procedure. The complainant did not file a revision petition against that order of discharge, but he preferred a fresh complaint against the petitioners for the same offence as he was clearly entitled to do under the law. The Additional First Class Magistrate dismissed that complaint after recording the sworn statement of the complainant and without issuing process to the accused. The complainant preferred a revision petition in the Sessions Court of Vellore, against the order of dismissal of the complaint, and the Sessions Judge set aside that order and directed the restoration of, and further enquiry into, the complaint.

The main objection raised for the petitioners is that the Sessions Judge ordered further enquiry against the petitioners without notice to them and without giving them an opportunity to show cause, as required in proviso to section 436 of the Code of Criminal Procedure. It is pointed out that this was the second complaint and that in the prior proceeding the accused had appeared and had contested the case and that thereafter the accused were discharged. I find no force in this contention as the proviso to section 436 only directs notice in the case of "any person who has been discharged" and not in the case of a person to whom no process had been issued and when the complaint has been dismissed without notice to him. It has been held by a Full Bench of this Court in *Apparao Mudaliar* v. *Janaki Ammal*[1] :

> "An accused person is said to be discharged (within the meaning of the proviso to section 436 of the Code of Criminal Procedure) when the case against him is thrown out under sections 209, 253 or 259 or when the Advocate-General enters a *nolle prosequi* under section 333. The expression 'person who has been discharged' in section 436 refers to a person who has been discharged under sections 209, 253 or 259. A person against whom no process has been issued under section 204 is not a discharged person and therefore no notice is necessary to him, when . . . . . . the Sessions Court directs further enquiry into a complaint dismissed under section 203 or sub-section (3) of section 204."

The same view was held by the Allahabad High Court in *Emperor* v. *Gajraj Singh*[2].

On the merits there is no substance in this case. As pointed out by the learned Sessions Judge the real test is good faith, and this is simply satisfied by the fact that the complainant was present at 11 A.M. on the date of hearing. The only default committed was that he was not there at 10 A.M. which was mentioned in the muchilika executed by him; but it is evident that he came within the appointed time and he had to go away to instruct his vakil and came back to Court at 11 A.M. which was the appointed hour for the sitting of the Court. In these circumstances the dismissal of the second complaint by the Additional First Class Magistrate was not justified, and the learned Sessions Judge was right in reversing that order and directing further enquiry. The petition is dismissed.

V.P.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

Kuppa Sankara Sastri and others .. *Appellants**

v.

Kakumanu Varaprasad and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 144—Restitution—Sale in execution of mortgage decree (for about Rs. 4,120) of two items of property for Rs. 1,900 and Rs. 2,223 respectively after rejection of application under section 19 of Madras Act (IV of 1938) on the ground that applicant was not possessed of saleable interest in agricultural land—Order on revision after confirmation of sale that the equity of redemption must be deemed to be saleable interest in agricultural land—Subsequent scaling down of decree to Rs. 2,469—Restitution—Criterion—Sale if to be set aside.

Madras Agriculturists' Relief Act (IV of 1938), sections 7 and 19—Sale in execution of decree which is subsequently scaled down—Validity.

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1. (1926) 51 M.L.J. 605 : I.L.R. 49 Mad. 918 (F.B.). 2. (1925) I.L.R. 47 All. 722.

* A. A. A. O. No. 298 of 1945. 28th February, 1947.

After the rejection of an application under section 19 of the Madras Agriculturists' Relief Act on the ground that the mortgagors judgment-debtors had no saleable interest in agricultural land and were therefore not "agriculturists" two items of property were sold in execution of the mortgage decree for Rs. 1,900 and Rs. 2,223 respectively, the preliminary decree being for Rs. 4,119-7-4. A revision petition against the rejection of the application under section 19 of Madras Act IV of 1938 resulted in a decision that to the extent of their interest in the equity of redemption the judgment-debtors must be deemed to have been possessed of a saleable interest in agricultural lands and therefore agriculturists. The decree was then scaled down to a sum of Rs. 1,728-9-0 and Rs. 493 costs with subsequent interest amounting in all to Rs. 2,469. The judgment-debtors claimed by way of restitution the cancellation of the sale on payment by them of the amount of the decree as scaled down or at least that the sale of the second item of property should be set aside on payment of the small balance of the scaled down amount due. Negativing the claim,

Held: (*i*) Unless the decree had been amended by appropriate procedure it was not open to the executing Court to refuse to execute the decree as it stood and the sale did not offend section 7 of Madras Act IV of 1938.

(*ii*) Had the ultimate decree as scaled down been in existence at the time of the sale the executing Court would have had no option but to proceed with the sale of the second item also as the sale of the first item would have left a balance of approximately Rs. 569 still due under the amended decree.

(*iii*) The judgment-debtors are entitled only to a refund of the difference between the amount due on the decree as scaled down and the amount realized by the sale.

True criterion for restitution indicated.

Venkataswami Naidu v. *Annappareddi Nagireddi*, (1946) 1 M.L.J. 5, applied.

Appeal against the order of the District Court, Guntur, dated 14th August, 1945, in A. S. No. 565 of 1944 (E. P. No. 341 of 1943 in O. S. No. 36 of 1936, Subordinate Judge's Court, Tenali).

M. S. Ramachandra Rao for Appellants.

P. Satyanarayana Rao for Respondents.

The Court delivered the following

JUDGMENT.—The appellants were indebted to the respondents under a mortgage of 1928. A suit was filed on the mortgage and a preliminary decree was passed on the 13th August, 1937, for a sum of Rs. 4,119-7-4. A final decree followed on the 8th January, 1938. An application was filed under section 19 of Madras Act IV of 1938 to scale down the decree. At the time when this application was filed, execution proceedings were pending. The application was rejected on the ground that the judgment-debtors were not agriculturists, they having no saleable interest in agricultural lands. The sale was held on the 9th January, 1939. Item I realised Rs. 1,900 and item II realised Rs. 2,223. The decree-holder was the purchaser of both lots. The judgment-debtors filed a revision petition against the dismissal of their application under section 19 of the Act but there was no stay of confirmation of the sale, nor was any deposit made or tendered even of the admitted amount. The revision petition resulted in a decision that to the extent of their interest in the equity of redemption the judgment-debtors must be deemed to have been possessed of a saleable interest in agricultural lands and therefore to be agriculturists. The application under section 19 of the Act was remitted to the trial Court with the result that the decree was scaled down to a sum of Rs. 1,728-9-0 and Rs. 493 costs with subsequent interest. On the basis of the decree as scaled down the amount which must be deemed to have been due at the time of the sale was approximately Rs. 2,469.

The appellants claimed by way of restitution the cancellation of the sale on payment by them of the amount of the decree as scaled down. Both the Courts below have held that they were not entitled to have the sale cancelled but that they are entitled to a refund of the difference between the amount due on the decree as scaled down and the amount realised by the sale.

In appeal it is contended firstly that the sale for more than the scaled down amount offended against section 7 of Act IV of 1938; and secondly that the equitable way of dealing with the application for restitution is to set aside the sale, at any rate, of the second item, leaving, the judgment-debtors to deposit the small amount which remained due under the revised decree after the sale of the first item.

The first argument cannot be sustained. It is now well settled that the general provisions of section 7 of Madras Act IV of 1938 must be read in the light of the specific provisions of section 19 relating to decrees; and unless and until the proper procedure has been taken to alter the decree, it is not open to the executing Court to refuse to execute the decree as it stands.

The second argument also seems to rest on a misunderstanding of the correct legal position. When the first item was sold for Rs. 1,900 there would remain an amount of approximately Rs. 569 due under the decree as finally scaled down. This amount was secured on the balance of the hypotheca and unless it was paid the Court had necessarily to complete the sale. It has not been shown that the second item was capable of sub-division with convenience or that if the decree as ultimately revised had been in existence at the time of the sale, the sale of the second item would not have been necessary in order to realise the balance of the decree. The legal position has been summarised in *Venkatasami Naidu* v. *Annappareddi Nagireddi*[1], the head-note of which was as follows :

"As the true criterion for restitution is to consider what would be the position had the appellate Court's decree been passed by the Court of first instance and as the sales which had been held were sales which would have been held even if the Court of first instance had decreed the amount eventually found to be due in appeal, there was no legal or equitable reason for setting aside the sales."

On the figures in the present case it is apparent that the sale of the first item would have left a balance of approximately Rs. 569 still due under the amended decree, and had the ultimate decree been in existence at the time of the sale, the executing Court would have had no option but to proceed with the sale of the second item in order to realise the balance due under the decree. In fact, the judgment-debtors have been paid the whole of the excess price realised by the sale and their real grievance is that they have lost the increment in the values by the sale. There is no equitable reason why they should be entitled to claim any portion of this increased value.

The appeal is dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Ramaswami Reddi .. *Appellant**

v.

Deivasigamani Pillai and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 10—Impleading of a new party as a defendant at the instance of the plaintiff—Newly added party setting up title in himself as against both the plaintiff and the defendants—Transposition of that party as co-plaintiff at the fag end of the trial and suit being decreed in his favour—Propriety.

Where *A* and *B* are disputing title to a property setting up rival claims, it is not open to a third party *C* to come on the scene and insist on his title which is contrary to that set up by *A* and *B* being investigated and it would not be right for a Court to implead such a person as a defendant and to transpose him subsequently at the fag end of the trial as a co-plaintiff and pass a decree in his favour.

Appeal against the decree of the Court of the Subordinate Judge, Cuddalore, in A. S. No. 120 of 1944, preferred against the decree of the Court of the District Munsiff, Tindivanam, in O. S. No. 943 of 1941.

P. V. Vallabhacharyulu for Appellant.

S. Panchapakesa Sastri and *K. R. Krishnaswami Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—A decree was passed by the District Munsiff in favour of the 8th defendant who was transposed at the fag end of the trial of the suit as 2nd

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1. (1946) 1 M.L.J. 5.

* S. A. No. 1581 of 1945. 3rd March, 1947.

plaintiff, notwithstanding the opposition of the defendants 1 to 7 on the one hand and the 1st plaintiff on the other. This decree has now been upset by the Subordinate Judge, Cuddalore and the second appeal has been preferred by the 8th defendant-2nd plaintiff.

The procedure followed in the District Munsiff's Court was, to say the least, extraordinary. The plaint was originally only against defendants 1 to 7. Later, the plaintiff filed a petition to implead the 8th defendant as a party on the ground that he was claiming some right in the suit properties and that he might be allowed to state his objections. This petition was allowed and the 8th defendant came on record and he set up title to the property in himself as against the plaintiff and as against the 1st defendant. He also suggested by means of a petition that the 9th defendant, one Kokilambal Ammal might be made a party to the suit so that any title that she might have to the property might be investigated. This was also ordered. The 9th defendant stated that the deed under which the claim was made was a nominal transaction and that the title was with the 8th defendant himself. The 8th defendant filed a written statement impeaching the title of the 1st defendant and the plaintiff and stating that at the instigation of the enemies the mother of the minor plaintiff had made him a party and that the plaintiff's title was false. According to him, neither the plaintiff nor the defendants 1 to 7 had any manner of right whatsoever in the suit property. He also prayed that the Court may be pleased to pass a decree declaring that the plaintiff was not entitled to the suit property and, directing that he be transposed as the 2nd plaintiff and be put in possession of the suit property.

As stated already, after the suit had practically been heard and just before its final end, the 8th defendant filed I. A. No. 1021 of 1943 on 28th August, 1943, to be transposed as a plaintiff. This was stoutly opposed by the 1st defendant. Even the plaintiff who wanted the 8th defendant to come on record made a show of opposition by filing a memorandum of objections stating that the petition of the 8th defendant was frivolous and vexatious and that he cannot be transposed as a plaintiff on the benefit of the court-fees paid by himself and that he refused to have him on his side. Despite this opposition, the District Munsiff made up his mind to transpose the 8th defendant as a co-plaintiff and on the evidence he found that the plaintiff had no title but that the title set up by the 8th defendant was true and hence he gave in his favour a decree for possession.

It is only natural that proceedings of this kind and a decree passed on such proceedings should have come up for consideration at the hands of the appellate Court and the Subordinate Judge has in my opinion reached the proper conclusion when he said that the decree of the District Munsiff in favour of the 8th defendant could not be sustained. He held that he should not have been transposed as a co-plaintiff as he was by no means interested in the title set up by the plaintiff and that he had nothing in common with him in respect of title but on the other hand pleaded that the plaintiff's title was false and that his own title was true. If a person who has the same interest as the plaintiff or a common or like interest with him does not join in the institution of the suit or is impleaded only as a defendant it would be proper for a Court to get him arrayed as co-plaintiff. But in a case of this kind where the 8th defendant was setting up title adverse to the plaintiff on the one hand and defendants 1 to 7 on the other it was wholly improper to have made him a co-plaintiff and given him a decree in addition at the penultimate stage of the trial. In saying this I am not stating anything against the title set up by the 8th defendant or the findings reached in his favour by the District Munsiff. The findings may be right or may be open to challenge. Even the learned advocate for the appellant did not seek seriously to maintain this decree but what was urged on his behalf was that the 8th defendant having been impleaded and a question of title to the property having arisen as between the plaintiff and the defendants 1 to 7 it was necessary for the Court to adjudicate on the title of these parties, Order 1, rule 10 of the Code of Civil Procedure being wide enough to cover cases of addition of parties not only for the purpose of deciding questions involved in the suit as it was originally framed but all questions that

relate to the subject-matter of the suit. In support of this view three decisions were cited: namely (1) *Vanjiappa Goundan* v. *Annamalai Chettiar*[1], (2) *Parasuram Mangacharyulu* v. *Parasuram Balarama Krishnamacharyulu*[2], (3) *Montgomery* v. *Foy Morgan & Co.*[3] But it may be pointed out that they deal with different set of facts altogether and have nothing in common with the facts of the present case. In the first case decided by Patanjali Sastri, J., in *Vanjiappa Goundan* v. *Annamalai Chettiar*[1], the second plaintiff was in the suit from the very commencement but he was added without his knowledge and the 1st plaintiff's interests were adverse to that of his own and in the circumstances the learned Judge held that it would be expedient to strike out his name as second plaintiff but as he was clearly a person whose presence before the Court was necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit, he could be transposed as a defendant in the suit. In the second case, three plaintiffs filed a suit for a declaration that they were the hereditary archakas of a temple. Another party came up with a petition that he was also an archaka along with the three plaintiffs and that he was entitled to perform the services. The learned Judge held that it was a case in which the relief claimed rendered the presence of the new defendant necessary. The English decision relates to a case where the Court held that the shippers of the cargo who had a claim to a set-off by way of damages should be before the Court to decide the plaintiff's claim, as otherwise the defendants who were only the agents would have no defence whatever to make in respect of the plaintiff's claim.

The learned Subordinate Judge rightly points out that when *A* and *B* are disputing title to a property setting up rival claims it is not open to a third party, *C* to come on the scene and insist on his title which is contrary to that set up by *A* and *B* being investigated and it would not be right for the Court to implead him and ask the defendant to fight the newly added man who comes into the arena at his own instance or at the suggestion of a colluding plaintiff as is found in this case.

The decree of the District Munsiff in favour of the 8th defendant was rightly set aside by the Subordinate Judge. This second appeal is dismissed with costs. Leave refused.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE GOVINDARAJACHARI.

Kowtha Sooryanarayana Rao .. *Appellant**

v.

Sarup Chand Rajaji .. *Respondent.*

Limitation Act (IX of 1908), section 20 (2)—Scope and applicability—Sale of equity of redemption to mortgagee himself—Sale subsequently annulled as invalid—Receipt of rents in the interval is tantamount to paymen under section 20 (2) sufficient to save limitation—Civil Procedure Code (V of 1908), Order 23, rule 1 (4)—Applicability—Second suit by first mortgagee impleading the second mortgagee and the owner of, the equity of redemption—Not identical in its nature with the first suit to which the owner of the equity of redemption alone is a party.

On 24th March, 1908, *A* executed for himself and as guardian of his then minor sons *B* and *C* a deed of mortgage for Rs. 9,500 in favour of *D* mostly for the discharge of antecedent debts which he had incurred. The mortgage was to be repaid in 12 annual instalments and it was provided that if default was committed in respect of the first, second and third instalments consecutively the entire amount of principal and interest should then become payable. In 1918 a receiver appointed in another suit gave three mortgages over the same properties in favour of *X*. In 1919 the equity of redemption was brought to sale in execution of a money decree against *A* and his sons *B* and *C* and was purchased by *Y*. *A* and his sons having defaulted in the payment of the first three instalments due under the mortgage, their mortgagee *D* filed a suit in 1921 to recover the entire amount

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1. (1939) 2 M.L.J. 551.
2. (1939) 2 M.L.J. 872.
3. (1895) 2 Q.B. 321.

* Appeal No. 255 of 1945. 20th December, 1946.

of principal and interest due under it impleading *A* and his sons and *Y*, but *X* who had obtained in 1918 the three mortgages from the receiver was not made a party to the suit. On 6th February, 1922, *Y* executed a sale deed conveying his equity of redemption in the hypotheca to *D* and both of them filed a *razinama* in the Court. The subsequent mortgages of 1918 were referred to and it was provided that the vendee should retain the benefit of the first mortgage as against the subsequent mortgagee. The suit on the first mortgage was dismissed on 8th February, 1922. *X* filed a suit in 1930 on the foot of his three mortgages of 1918 impleading amongst others *Y*, *A* and his sons and *E* the son of *D* who had died in 1929. By the time *X's* suit came on for hearing the sale to *Y* was held to be one brought about in furtherance of a scheme to defraud the creditors of *A*, *B* and *C*. In the judgment in that suit it was recited that the sale to *Y* was invalid and *E* made no attempt to prove the sale to his father. The priority of *E's* mortgage was conceded and it was provided in the decree that the hypothecated properties should be sold "subject to the prior mortgage of *E* of 1908". In the sale proclamation it was mentioned that the "mortgage was executed fraudulently and without consideration." *X* the decree-holder himself purchased the hypotheca in Court auction and in the sale certificate it was again mentioned that the sale was subject to the mortgage of 1908 and he applied for possession under Order 21, rule 95, Civil Procedure Code. Meanwhile *E* was adjudicated insolvent in 1934 and the Official Receiver in whom the insolvent's estate was vested and who had not been impleaded in the application under Order 21, rule 95, succeeded in obtaining possession in fasli 1344 (1934-35). *X's* proceedings in the insolvency culminated in an appeal in which it was held that the receiver could only sell the right of the insolvent in the mortgage of 1908, but could not resist the application for delivery made by *X*. *X* accordingly obtained possession of the properties in fasli 1345 (1935-36). The Official Receiver sold the insolvent's rights in that mortgage to *M* on 8th January, 1942 and the shares of the insolvent's sons were also sold by them to *M* on 21st September, 1942. *M* filed a suit on 3rd March, 1943, on foot of the mortgage of 1908. *X* contested the suit on the ground of limitation.

In the circumstances,

Held: (1) *X* had nothing whatever to do with the providing of the satisfaction of the mortgage by the sale by *Y* to *D* on 6th February, 1922 and no fresh cause of action accrued on the annulment of that sale. Neither the predecessors in title of *M*, nor *X* were parties to the proceedings in which the sale to *Y* was set aside and even if that sale stood a suit had to be filed for working out the extinguishment of the puisne mortgage.

Mussumat Ranee Surno Moyee v. *Shooshee Mokhee Burmonia*, (1868) 12 M.I.A. 244; *Huro Pershad Roy* v. *Gopal Das Dutt & Co.*, (1882) L.R. 9 I.A. 82 : I.L.R. 9 Cal. 255 (P.C.) and *Muthuveerappa Chetty* v. *Adaikappa Chetty* (1920) 39 M.L.J. 312 : I.L.R. 43 Mad. 845, distinguished.

The decree in *X's* suit of 1930 cannot be construed as creating a new right in favour of *M's* predecessors in title or as affording a fresh cause of action.

But as *D* took possession of the mortgaged properties on 6th February, 1922 and continued to be in possession till his death in 1929 when the properties passed into the hands of his son *E*, who retained possession till December, 1931, when the receiver in a partition suit between him and his sons took possession of all their properties and continued to be in possession till about the middle of 1934, and the Official Receiver in the insolvency of *E* took possession in 1934-1935 till *X* went into possession, section 20 (2) of the Limitation Act applied and the suit was within time.

Doraiswami v. *Periakaruppan*, (1941) 1 M.L.J. 388 : I.L.R. 1941 Mad. 739, relied on.

Though the sale to *Y* be invalid the receipt of rents by the vendees must be deemed to be possession in their capacity as mortgagees and the receipt of rents is tantamount to payment within the meaning of section 20 (2) of the Limitation Act.

(2) The rights of a second mortgagee or a purchaser of the equity of redemption who is left out of a mortgage suit filed by the first mortgagee remain altogether unaffected by such suit and by the sale in execution of the decree therein. A second suit by the first mortgagee impleading the second mortgagee and the owner of the equity of redemption is not so identical in its nature with the first suit to which the owner of the equity of redemption alone was a party as to come within the mischief of Order 23, rule 1, sub-rule (3) of the Code of Civil Procedure. If the rights of parties who were not impleaded remain unimpaired, it is a necessary corollary and consequence that the rights of the persons who failed to implead them should remain unimpaired too.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam, passed in O. S. No. 9 of 1943, dated 29th November, 1944.

V. K. Thiruvenkatachari, *N. V. B. Shankara Rao* and *G. Vasant Pai* for Appellant.

P. Satyanarayana Rao and *G. Venkatarama Sastri* for Respondent.

The Judgment of the Court was delivered by

Govindarajachari, J.—The facts of this case are somewhat complicated. On 24th March, 1908, one Kidambi Narasimhacharyulu executed for himself and as guardian of his then minor sons who are defendants 2 and 3 in the present suit a deed of simple mortgage for Rs. 9,500 in favour of one Chaturvedula Suryanarayana mostly for the discharge of antecedent debts, which he had incurred. The mortgage was to be repaid in 12 annual instalments and it was provided

that if default was committed in respect of the first, second and third instalments consecutively the entire amount of principal and interest should then become payable. A receiver appointed in O. S. No. 83 of 1915 on the file of the Subordinate Judge's Court, Bezwada, gave three mortgages over the same properties in favour of the first defendant in the present suit in the year 1918. In 1919 the equity of redemption of the Kidambis in those properties as also their interest in certain other properties were brought to sale in execution of a money decree against them in O. S. No. 69 of 1912 on the file of the District Court of Kistna and were purchased by Pyda China Ramakrishnayya, the fourth defendant in the present suit and one Addanki Lakshmanacharyulu who subsequently conveyed his interest to Pyda. The mortgagors having defaulted in the payment of the first three instalments due under the mortgage of 1908, Chaturvedula Suryanarayana filed O. S. No. 32 of 1921 on the file of the Subordinate Judge's Court, Bezwada, to recover the entire amount of principal and interest due under it, the defendants to that suit being the Kidambis and Pyda. Though the suit was filed on 23rd March, 1921, the present first defendant who had, as already stated, obtained three mortgages over the same properties in 1918 was for some unknown reason, not made a party to it. On 6th February, 1922, Pyda executed a sale deed whereby he conveyed his equity of redemption in the hypotheca to Chathurvedula Suryanarayana for a stated consideration of Rs. 36,000 which represented the amount claimed in O. S. No. 32 of 1921, costs and subsequent interest. The sale deed stated that the vendor received the sale amount by way of payment of the mortgage debt. It then recited that "both of us have filed *razinama* in the Court." The mortgages granted to the present first defendant by the Receiver in O. S. No. 83 of 1915 were next referred to and it was distinctly provided that the vendee should retain the benefit of the first mortgage as against the subsequent mortgagee. On 8th February, 1922, O. S. No. 32 of 1921 was dismissed. There is some obscurity as to what exactly happened at the time of its dismissal. Neither party in the present litigation is able to produce a certified copy either of the judgment or of the decree and the only material that is available is an extract from the suits register. It is stated therein that the suit was dismissed "as per adjustment reported in I. A. No. 113 of 1922." The present first defendant filed O. S. No. 3 of 1930 in the Court of the Subordinate Judge of Masulipatam on foot of his three mortgages of 1918 impleading amongst others Pyda, the Kidambis and Chaturvedula Venkata Subramanyam the son of Suryanarayana who had died in 1929. Chaturvedula Venkata Subramanyam was the 6th defendant. By the time O. S. No. 3 of 1930 came on for hearing Pyda's sale was held to be one brought about in furtherance of a scheme to defraud the creditors of the Kidambis, in a contest which arose between Pyda and an unsecured creditor of the Kidambis. In the judgment in O. S. No. 3 of 1930 Ex. P-7 it is mentioned that it was stated on behalf of the plaintiff therein, *i.e.*, the present 1st defendant that Pyda's sale had been set aside since the institution of the suit. The 6th defendant would appear to have put forward the sale in his father's favour by Pyda on 6th February, 1922, but in view evidently of the fact that Pyda's sale was itself declared to be invalid, no attempt was made on behalf of the 6th defendant to prove the sale he was relying on. The priority of the 6th defendant's mortgage having been conceded by the plaintiff's pleader, the decree passed in O. S. No. 3 of 1930 provided that the hypothecated properties should be sold "subject to the prior mortgage of the 6th defendant dated 24th March, 1908." The sale proclamation in O. S. No. 3 of 1930 also stated that the hypotheca was being sold subject to the mortgage of 1908; but a remark was added "that it was executed fraudulently and without consideration." The plaintiff-decree-holder in O. S. No. 3 of 1930 himself purchased the hypotheca in Court auction and the sale certificate issued in his favour again mentioned that the sale was subject to the mortgage of 24th March, 1908. He applied for possession under Order 21, rule 95, Civil Procedure Code, notwithstanding that the property was in the possession of tenants and delivery is said to have been given to him on 13th May, 1935. It is not suggested that the tenants were turned out of possession but in view of the later proceedings it

is unnecessary to consider the validity or effect of this delivery which is said to have been given to him. Meanwhile Chaturvedula Venkatasubramanyam was adjudicated insolvent in I.P. No. 24 of 1934 and the Official Receiver in whom the insolvent's estate was vested and who was not made a party to the application of the auction purchaser (present first defendant) in O.S. No. 3 of 1930 under Order 21, rule 95 succeeded in obtaining possession of the lands in fasli 1344 (1934-35). This led to certain petitions filed by the present first defendant in I.P. No. 24 of 1934 whereby he prayed that the property purchased by him should be excluded from the schedule of assets of the insolvent and that the Official Receiver should be directed not to sell the property or deal with it in any way. These proceedings culminated in the judgment of the High Court in C.M.A. Nos. 30 and 530 of 1938 wherein it was held that the Official Receiver could sell the right of the insolvent in the mortgage of 1908, but that he could not resist the application for delivery made by the present first defendant. The first defendant accordingly obtained possession of the properties in fasli 1345 (1935-36). The Official Receiver sold the insolvent's right in that mortgage to the present plaintiff on 8th January, 1942. The shares of the insolvent's two sons were also sold by them to the plaintiff on 21st September, 1942. In the present suit which was filed on 3rd March, 1943, on foot of the mortgage bond dated 24th March, 1908, the plaintiff prays for a mortgage decree for Rs. 12,000 to which amount he restricted his claim notwithstanding that according to him an amount of nearly Rs. 80,000 would be due under the terms of the mortgage. The second and third defendants are the Kidambis and the 4th defendant is Pyda. The contesting defendant is the first. The lower Court decreed the suit as prayed for and in this appeal which has been filed by the first defendant two points are pressed on his behalf.

It is first contended that the present suit is barred by limitation as it is laid 35 years after the execution of the mortgage and there are no such acknowledgments of liability or payments by the mortgagor as would attract the operation of section 19 or section 20 (1) of the Limitation Act. On behalf of the plaintiff respondent it is argued that the matter can be viewed in any one of three different ways and that in whichever way it is viewed the suit would be in time. It is stated relying on the principle underlying *Mussumat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia*[1], *Huro Pershad Roy* v. *Gopal Das Dutt & Co.*[2] and *Muthuveerappa Chetty* v. *Adaikappa Chetty*[3] that the mortgagee's claim was satisfied by the sale deed of 6th February, 1922 and that when this satisfaction was annulled by the setting aside of Pyda's sale on 2nd May, 1931, a fresh cause of action arose on the mortgage and that the present suit which is within 12 years of such setting aside is therefore within time. These decisions were concerned with a very peculiar type of cases where a debtor provides satisfaction which is subsequently annulled at his instance and it is consequently held that a fresh cause of action in the nature of the original cause of action arises on such annulment, the original cause of action being one which could not be sued upon so long as the satisfaction stood. It would be noticed that the 1st defendant who is raising the question of limitation here had nothing whatever to do with the providing of the satisfaction which is said to have been subsequently annulled, the claim of the plaintiff being that the mortgage of 1908 was satisfied by the sale deed executed by Pyda on 6th February, 1922. Further Pyda's sale was set aside in a proceeding to which neither the predecessors in title of the plaintiff nor the first defendant were parties. Moreover even if Pyda's sale stood the plaintiff could sue and has to sue the first defendant in order to work out the extinguishment of the puisne mortgages held by the latter. We consider that these distinguishing features of the present case render the decisions cited by the respondent altogether inapplicable.

It is then argued for the respondent relying on the decisions in *Ramasubba Aiyar* v. *Arunachalam Chettiar*[4] and *Batey Krishna* v. *Pursotam Das*[5], that the decree

1. (1868) 12 M.I.A. 244.
2. (1882) L.R. 9 I.A. 82 : I.L.R. 9 Cal. 255 (P.C.).
3. (1920) 39 M.L.J. 312 : I.L.R. 43 Mad. 845.
4. (1946) 1 M.L.J. 379.
5. (1944) 2 M.L.J. 330 : L.R. 71 I.A. 153 : I.L.R. 1944 All. 654 (P.C.).

in O.S. No. 3 of 1930 which directed the hypotheca to be sold subject to the mortgage of 1908 and which is dated the 1st day of September, 1931, is the starting point of limitation. This argument again we are unable to accept. The former of the two decisions quoted was concerned with a judgment and decree of the High Court which, while giving possession of certain properties to one party expressly declared in favour of the other party who was being dispossessed, a charge for the amount which he had paid for the discharge of certain mortgages on those properties. In the latter case the facts of which are fully set out in *Ramasubba Aiyar* v. *Arunachalam Chettiar*[1], the prior claim of a person who discharged two mortgages of 1909 and 1915 was recognised in a suit for foreclosure brought by a subsequent mortgagee and a charge was declared in the former's favour " and presumably incorporated in the foreclosure decree." We see much difference between those cases and the present one. There is here no declaration of a right which came into existence on 1st September, 1931. The decree is in the usual form of a mortgage decree passed in a suit by a puisne mortgagee against the prior mortgagee and the mortgagor and it does no more than recognise the fact of a prior mortgage created in 1908. We are altogether unable to construe it as creating a new right in favour of the plaintiff's predecessors in title or as affording a fresh cause of action.

Reliance has next been placed by the respondent on a decision in *Doraiswami* v. *Periakaruppan*[2], and section 20 (2) of the Indian Limitation Act and it is argued that the mortgagee who went into possession of the mortgaged properties under the sale deed, dated 6th February, 1922, and retained such possession till about 1934 must in view of setting aside of Pyda's sale in 1931 be deemed to have been in possession of the properties as mortgagee. This line of reasoning found favour with the lower Court and in our opinion rightly. The relevant facts are not in dispute. Chaturvedula Suryanarayana took possession of the mortgaged properties on 6th February, 1922, and the sale deed executed by Pyda in his favour recites it. He continued to be in possession till his death in 1929 when the properties passed into the hands of his son, who retained possession till December, 1931, when the receiver in a partition suit between him and his sons (O.S. No. 65 of 1931), took possession of all their properties including the suit properties and continued to be in possession till about the middle of 1934.

The Official Receiver in the insolvency of Venkata Subramanyam appears to have taken possession of the suit properties in fasli 1344 (1934-35) and continued to be in such possession for part of fasli 1345, till the 1st defendant went into possession. Between 1922 and 1934 therefore the mortgagees were in possession and the Official Receiver in the insolvency of one of them was in possession for another year. If the mortgagees can be held to be in possession *qua* mortgagees between 1922 and 1934, section 20 (2) of the Indian Limitation Act would clearly apply and the present suit would be in time. Mr. Tiruvenkatachari does not dispute the principle laid down in *Doraiswami* v. *Periakaruppan*[2], nor are the facts as to possession which we have just set out in dispute. He argues however that in order to invoke the principle in *Doraiswomi* v. *Periakaruppan*[2], it must first be decided whether Pyda's sale was invalid with the consequence that the sale by Pyda to Chathurvedula Suryanarayana on 6th February, 1922, would also be invalid and that the lower Court went wrong in assuming that Pyda's sale was invalid without adjudicating on it as between the present parties, the declaration as to the invalidity of Pyda's sale given in 1931 as between him and the creditors of the Kidambis being an adjudication which is not binding on the present parties. No doubt the learned Subordinate Judge did not go into the question whether Pyda's sale was invalid or not. But a remittal of the case to the lower Court for an investigation of this question is unnecessary as in our opinion, the judgment of the High Court in C.M.As. Nos. 30 and 530 of 1938 dealt with this matter and constitutes an adjudication binding on the plaintiff and the first defendant. The first defendant was

1. (1946) 1 M.L.J. 379.
2. (1941) 1 M.L.J. 388 : I.L.R. 1941 Mad. 739.

the petitioner and the Official Receiver in the insolvency of Chaturvedula Subramanyam was the respondent in the petitions which resulted in those civil miscellaneous appeals. The pleadings in those petitions are not available but it appears from Exhibit D-2, the order of the District Judge of West Godavari therein that the first defendant filed in support of his case the judgment and decree in O.S. No. 18 of 1928 wherein Pyda's sale was declared to be invalid and it is clear therefore that the first defendant was asserting the invalidity of Pyda's sale while the Official Receiver was seeking to resist the first defendant's claim to be put in possession of the properties on the ground that Chaturvedula Venkata Subramanyam and his sons were the owners of the property and that in the right of Venkata Subramanyam he was entitled to retain possession as owner. It was pointed out on behalf of the first defendant that Chaturvedula Suryanarayana's son and grandsons were not entitled to be in possession as owners having regard to the invalidity of Pyda's sale. The judgment of the High Court refers in more than one place to the invalidity of that sale and consequently of the sale of 1922 by Pyda to Chaturvedula Suryanarayana and proceeds to state that the first defendant was entitled to obtain possession of the properties, and that the Official Receiver could claim only the interest of a mortgagee. If because of this decision it must be taken as between the present parties that Pyda's sale was invalid and consequently that no title passed to Suryanarayana under the sale deed dated 6th February, 1922, it is not denied that the possession of Chaturvedulas must be deemed to be possession in their capacity as mortgagees, and that the receipt of rents is tantamount to payment within the meaning of section 20 (2) of the Limitation Act with the result that the present suit which is filed within 12 years of such possession must be held to be within time.

The second contention raised on behalf of the appellant is that the present suit based on the mortgage of 1908 is barred under Order 23, rule 1, sub-rule (3) of the Code of Civil Procedure having regard to the dismissal of O.S. No. 32 of 1921. That suit, it is argued, was dismissed following upon the mere withdrawal of the plaintiff and it is claimed that O.S. No. 32 of 1921 and the present suit are in respect of the same subject-matter within the meaning of Order 23, rule 1 (3), because they are both based on the mortgage of 1908 and the plaintiff in the present suit is the representative in interest of the plaintiff in the previous suit. It is recognised that the first defendant who is in the position of a puisne mortgagee under his mortgages of 1918 was not a party to O.S. No. 32 of 1921, but it is said that this makes no difference. The argument is that since the owner of the equity of redemption is a necessary party to a mortgagee's suit for sale and since the first defendant is the present owner of the equity of redemption and in that right the representative in interest of the Kidambis who were defendants to O.S. No. 32 of 1931 the subject-matter of the two suits is the same and the parties are substantially the same notwithstanding that the first defendant was not a defendant in O.S. No. 32 of 1921 and notwithstanding that he is a puisne mortgagee also. The Kidambis also are parties to the present suit, but admittedly they have now no right of any kind. On behalf of the respondent it is answered that the dismissal of O.S. No. 32 of 1921 was not a dismissal following upon the mere withdrawal of the plaintiff from the suit, but that it was really a case where it was reported to the Court that the suit was adjusted and that the defendant satisfied the plaintiff in respect of the whole of the subject-matter of the suit and the Court consequently ordered the adjustment or satisfaction to be recorded and proceeded to pass a decree in accordance therewith as contemplated by Order 23, rule 3 of the Civil Procedure Code. In the alternative it is argued that even if Order 23, rule 3 does not apply and the dismissal of the suit is held to have followed a mere withdrawal of the plaintiff, the two suits cannot be regarded as relating to the same subject-matter as the presence of the first defendant the puisne mortgagee in the later suit and his absence in the earlier would make a material difference in their nature.

Dealing first with the controversy as to what happened in the suit of 1921 it will be recalled that Pyda who was the 4th defendant in O.S. No. 32 of 1921 and

who, it was then assumed was entitled to the equity of redemption executed a sale deed conveying the same, in satisfaction of the suit claim, subsequent interest and costs, that it was expressly recited in that deed that the plaintiff and Pyda "filed *razinama* in the Court" and that two days thereafter the suit itself was dismissed "as per adjustment reported in I.A. No. 113 of 1922". What exactly the prayer in I.A. No. 113 of 1922 was, neither party is in a position to say; but we may not be wrong in assuming that it must have related to the adjustment of the suit claim by the execution of the sale deed. It seems to us in all the circumstances that it is quite likely and probable that the adjustment or satisfaction was reported to the Court and that the parties invited the Court to dismiss the suit as there was nothing further to be done in view of its adjustment or satisfaction. The mere fact that the decree is one of dismissal does not mean that there was a mere withdrawal of the plaintiff from the suit as contemplated by Order 23, rule 1 as there can quite conceivably be a dismissal of a suit even where the suit is adjusted or the claim is satisfied and the adjustment or satisfaction is merely recorded without however any need to pass a decree in terms thereof as there may remain nothing further for either party to do. It is for the first defendant who is invoking the bar of Order 23, rule 1 (3) to make out satisfactorily that the case falls under that provision. It seems to us that he has failed to do so and notwithstanding that there is no document now available showing that the adjustment or compromise was recorded by the Court it is only reasonable to assume that it must have been so recorded in view of the various circumstances to which we have already alluded.

We also accept the alternative argument of the respondent. The question therein involved has been fully argued before us by both the learned counsel. The complications that arise by reason of the failure to implead in a mortgage suit the puisne mortgagee or the owner of the equity of redemption in a portion of the hypotheca have been the subject of consideration in a series of cases. There is an elaborate discussion in several of them as to the rights and remedies of the person who has been so omitted as also of the person who has failed to implead all the necessary parties in his suit. Whatever might have been the oscillations of judicial opinion in the other High Courts, this High Court has been consistently holding since *Mulla Vittil Seethi* v. *Achuthan Nair*[1], if not even earlier, that the rights of a second mortgagee or of a purchaser of the equity of redemption who is left out of a mortgage suit filed by a first mortgagee remain altogether unaffected by such suit and by the sale in execution of the decree therein. The consequences of this position, which may be regarded as fundamental, have been worked out in the several decisions to which we shall now proceed to refer to the extent that they bear on the question with which we are directly concerned in the present case, namely, whether the second suit by the first mortgagee impleading the second mortgagee and the owner of the equity of redemption is so identical in its nature with the first suit to which the owner of the equity of redemption alone is a party as to come within the mischief of Order 23, rule 1 (3) of the Code of Civil Procedure.

In *Mulla Vittil Seethi* v. *Achuthan Nair*[1], a first mortgagee purchased the mortgaged property in execution of a decree on his mortgage, but as the second mortgagee with possession was not a party to the mortgage suit the first martgagee had, after his purchase, to file a suit for possession against the second mortgagee claiming in the alternative the recovery of the mortgage money and the following reference was made to a Full Bench.

> "Whether a first mortgagee who has purchased the mortgaged property in execution of a decree on his mortgage and sues for possession or in the alternative, for the recovery of his money is entitled to a decree for possession subject to redemption by a puisne mortgagee with possession who was not a party to the suit by the first mortagee?"

The Full Bench answered the question in the negative. It was contended on behalf of the first mortgagee that the second mortgagee was only entitled to redeem the first mortgage and that he could not resist the first mortgagee-purchaser's suit for possession. This was refuted and it was held that the second mortgagee's rights

1. (1911) 21 M.L.J. 213 (F.B.).

(whatever they were) at the date of his mortgage—whether to possession (if his mortgage be one with possession and the previous mortgage without it) or to sale or foreclosure under section 67, Transfer of Property Act, remain altogether unaffected by the first mortgagee's suit to which the former was no party. He has also the right to redeem the prior mortgage which is preserved in law in spite of the purchase by the prior mortgagee of the equity of redemption. But it is pointed out that redemption is a right which the pusine mortgagee may seek to enforce and not a liability which he may be compelled to discharge. After an elaborate examination of the principles of the law of mortgages and the provisions of the Transfer of Property Act and on a full review of the decided cases the Full Bench laid down certain propositions, the second of which runs as follows:

"The purchaser of the equity of redemption after the first mortgage and the second mortgagee both stand on the same footing with reference to their respective rights against the first mortgagee when they have not been impleaded in the suit instituted by him on his mortgage."

This decision is important as laying down the broad principle that the rights of the second mortgagee or the purchaser of the equity of redemption are left altogether unimpaired by a suit filed by the first mortgagee without impleading them and if their rights are unaffected by proceedings to which they are not parties, it stands to reason that the rights of the first mortgagee against them should remain equally unaffected notwithstanding his defective suit against certain others. Further it is stated in the order of reference to the Full Bench that

"it is not contended that the plaintiffs (the first mortgagees) are not entitled to file a fresh suit for sale against the puisne mortgagee."

The next case of importance is *Chinnu Pillai* v. *Venkataswamy Chettiar*[1], which is in many respects similar to *Mulla Vittil Seethi* v. *Achuthan Nair*[2]. There too, a prior mortgagee sued for sale on his mortgage without making the puisne mortgagee a party and obtained a decree. In execution of that decree the property was brought to sale, and was purchased by a stranger. The puisne mortgagee filed a suit for sale on his mortgage subject to the prior mortgage making the purchaser a party to his suit. It was held that he could maintain such a suit. The contention on behalf of the persons resisting the suit was that the puisne mortgagee had first to redeem the prior mortgage and then only bring the mortgaged property to sale but this was rejected and it was decided that the puisne mortgagee was under no such obligation and that the right of a puisne mortgagee to sue for sale subject to the prior mortgage is in no way impaired by the prior mortgagee's suit to which the puisne mortgagee was not a party. In the course of an elaborate consideration of the several complicated positions that arise in such cases Srinivasa Ayyangar, J., observes that "where the first mortgagee had omitted to make the second mortgagee a party and proceeded to sale, the purchaser whether himself or another can bring a fresh suit for sale making the second mortgagee a party."

Venkat Reddy v. *Kunjappa Goundan*[3] was a case where a purchaser of a portion of the hypotheca was left out of a mortgage suit. A stranger who purchased in execution of the mortgage decree filed a suit for sale against the mortgagor, the mortgagee and the purchaser who had been left out in the previous suit. It was first contended on behalf of the person last named relying on *Het Ram* v. *Shadi Ram*[4], that the mortgage had been extinguished by the decree and sale in execution. But it was pointed out that while that was undoubtedly the position under sections 85 to 90 of the Transfer of Property Act, those sections had been repealed and replaced by the provisions of Order 34 of the Civil Procedure Code of 1908 under which there is no such extinguishment of the right to redeem or of the security on the passing of an order absolute for sale and that "the mortgage is kept alive for all purposes as regards persons having an interest but not made parties to the mortgage suit." The later decision of the Privy Council in *Sukhi* v. *Ghulam Safdar Khan*[5], distinguishing *Het Ram* v. *Shadi Ram*[4], was

1. (1915) 30 M.L.J. 347: I.L.R. 40 Mad. 77.
2. (1911) 21 M.L.J. 213 (F.B.).
3. (1923) 46 M.L.J. 391 : I.L.R. 47 Mad. 551.
4. (1918) 35 M.L.J. 1 : L.R. 45 I.A. 130 : I.L.R. 40 All. 407 (P.C.).
5. (1921) 42 M.L.J. 15 : L.R. 48 I.A. 465: I.L.R. 43 All. 469 (P.C.).

particularly referred to. The next argument in resistence of the suit was that there could be no second suit on the same mortgage. This contention was dealt with in the following paragraph which we would fully set out.

"It is difficult to see how a second suit against a person not impleaded in the previous suit would be barred under any of the provisions of the Civil Procedure Code. It is no doubt true that the first mortgagee who had notice of a puisne encumbrance could have impleaded that puisne encumbrancer in the suit on the first mortgage but the failure to do so would not necessarily bar the second suit against the puisne encumbrancer unless there is anything in the Code barring such a suit. The cause of action is not the same as in the previous suit nor would the points to be decided necessarily be the same."

Though the case itself was one in which there was a failure to implead the purchaser of the equity of redemption in a portion of the hypotheca, no distinction was made between the case where such a purchaser was left out of a mortgage suit and the case where a puisne mortgagee was so left out. In fact in the paragraph just quoted it is the latter case that is directly considered.

The decision in *Sambasiva Ayyar* v. *Subramania Pillai*[1] may also be usefully referred to. In this case the first mortgagee (S.A.) failed to implead in a suit for sale the purchasers of two items of the hypotheca (S.P. and others). The puisne mortgagee was however a party. S.A. himself purchased the mortgaged properties in execution of his mortgage decree. He failed to obtain posession of the properties which had been purchased by S.P. and others prior to the mortgage suit. S.A. therefore filed a suit against S.P. and others for delivery of possession of those properties and alternatively for the payment of the amount, and failing which for the sale of the two properties. The Court held that S.A. filled two capacities, *viz.*, qua mortgagee and qua purchaser of the items mortgaged to him. It was further held that

"If S.A. filed the suit against S.P. and others on foot of the original mortgage in his capacity as mortgagee, he could sue for the whole of the mortgage amount impleading besides the mortgagor the purchasers of the equity of redemption in the mortgaged properties, *viz.*, S.P. and others in which case S.P. and others would have to redeem the whole of the mortgage debt though they purchased only a few of the items mortgaged, but the cause of action for such a suit would date from the date of the mortgage."

What is of interest to us in the present case is that the Bench which decided *Sambasiva Ayyar* v. *Subramania Pillai*[1] had no difficulty whatever in upholding the right of S.A. to sue a second time on foot of his mortgage notwithstanding that the mortgagors and puisne mortgagee were parties to the earlier suit also.

In view of these decisions it seems to us that the present suit which is filed not only against the owner of the equity of redemption but also against the puisne mortgagee is essentially different in its nature from O.S. No. 32 of 1921 which was filed against the owner of the equity of redemption alone. The object of the present suit is to obtain a decree which would be binding on the puisne mortgagee whereas no such decree could be obtained in the prior suit as the puisne mortgagee was not a party to it. The fact that the equity of redemption has to be and is represented in the present suit does not, in our opinion, alter the real nature of the suit whose main purpose is to give an opportunity to the puisne mortgagee to pay off the first mortgage or if no such payment is made to work out the extinguishment of his mortgage. The principle which is fundamental, *viz.*, that no person who is not impleaded in a suit can have his rights in any way lessened or reduced has been applied in *Mulla Vittil Seethi* v. *Achuthan Nair*[2] and the later decisions to some of which we have already made reference, as much in cases where the owner of the equity of redemption is left out as where the puisne mortgagee is left out and it seems to us that the necessary corollary and consequence of this principle is that if the rights of parties who were not impleaded remain unimpaired, the rights of the persons who failed to implead them should remain unimpaired too.

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1. (1936) I.L.R. 59 Mad. 312.
2. (1911) 21 M.L.J. 213 (F.B.)

Order 23, rule 1 (3) does not expressly provide that the bar which it imposes applies only as between the parties to the prior suit, but that is its obvious intendment.

We are therefore of the opinion that the present suit is not barred under Order 23, rule 1 (3), even if it should be held that the manner of disposal of O.S. No. 32 of 1921 brings it under Order 23, rule 1 and not under order 23, rule 3.

The appellant having failed on both his points, the appeal is dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE GOVINDARAJACHARI.

P. R. Viswanatha Iyer .. *Appellant**

v.

A. Muthukumaraswami Pillai and others .. *Respondents.*

Copyright—Panchangam—When copyright exists in—Agreement by compiler to prepare manuscripts year by year and to deliver it to a publisher with the sole right of publishing it for five years—How far an assignment of copyright—Breach of contract by compiler and publication of his manuscripts by a third party—Right to challenge and claim damages for breach of contract and infringement of copyright—Essentials—Recovery of damages for breach of contract—Effect on right to damages for infringement of copyright.

A panchangam if it was nothing more than a handy extract from published official tables, may not constitute an original literary work. But where it is found that it is an original composition worked out by a series of calculations based on a fairly elaborate set of rules in the knowledge of which the compiler is a specialist, it must be held that the work is an original literary work for the purpose of the Copyright Act of 1911.

Macmillan & Co., Ltd. v. *Cooper*, (1923) 46 M.L.J. 637 : L.R. 57 I.A. 109 : I.L.R. 48 Bom. 308 (P.C.), relied on.

G.A. Cramp & Sons, Ltd v. *Frank Smythson, Ltd.*, (1944) A.C. 329, distinguished.

Where such a compiler enters into an agreement with another for printing and publication for a period of five years of the panchangam to be cast by him year by year, an equitable assignment of each manuscript as and when it came into existence is created and the assignee has, notwithstanding the absence of a legal assignment, a right to challenge the publication of such manuscript by a stranger and maintain an action for damages provided the legal owner of the copyright is impleaded in the suit.

Performing Right Society, Ltd. v. *London Theatre of Varieties, Ltd.*, (1924) A.C. 1, discussed.

Where the compiler in breach of his agreement delivers the manuscript to a third person who publishes the same, unless it is pleaded and proved that the third person instigated or procured the breach he cannot be made liable in damages for the breach.

Notwithstanding the fact that he had successfully claimed damages for the breach of contract which led to the infringement, the equitable assignee of the sole right to publish the work is entitled to sue for damages for the infringement of that right by a third person.

Appeal against the District Court of Tinnevelly in O. S. No. 1 of 1944, etc.

T. L. Venkatarama Aiyar and *G. R. Jagadisa Aiyar* for Appellant.

P. N. Appuswami Aiyar for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—These two appeals arise out of an alleged breach of copyright in connection with the publication known as the Tinnevelly Vakya Panchangam which is a Tamil almanac giving information necessary for casting horoscopes, fixing fasts, festivals and ceremonies with reference to the phases of the moon and other relevant astronomical materials. It is distinguishable from an ordinary almanac in that it is prepared on the basis of calculations based on some 248 Vakyams or aphorisms embodying rules of astrological science. It is common ground that this particular Panchangam has been published for over 60 years from manuscripts furnished by the first defendant and his father. The publisher

* Appeal No. 301 of 1945 and S.A. No. 750 of 1945. 22nd November, 1946.

was up to 1940 the second plaintiff in the suit out of which Appeal No. 301 of 1945 arises.

The first defendant then quarrelled with the second plaintiff and as a result of that quarrel, he entered into an agreement, Ex. P-1, dated 20th February, 1941, with the first plaintiff. Under this agreement the first defendant was to cast the almanac known as the Tinnevelly Vakya Panchangam which he has been composing for about 60 years and deliver the manuscript to the first plaintiff for printing and publication for a period of five years from the year Chitrabanu, 1942, to the end of the year Vyaya, 1946. The first plaintiff was to pay the first defendant Rs. 350 per annum for his work. The agreement fixes the date within which the manuscript should be delivered in each year and prohibits the first defendant from writing or delivering a copy of the almanac to any one else. It is also stipulated that the first defendant should have the right to insert in the almanac eight pages of matter in Tamil and eight pages of matter in Grantham in addition to the almanac proper, and should himself be given 100 copies of the published work. Then follow the provisions regarding the manner of payment of the fee and the adjustment of advances.

On the basis of this agreement the panchangams for 1942 and 1943 were published; but in May, 1943, the first defendant sent a notice, Ex. P-8, to the first plaintiff alleging that the latter had broken the agreement by printing on the panchangam the name of the second plaintiff as publisher,knowing that the first defendant had broken off relations with the second plaintiff and wished to have no more to do with him. The first defendant called upon the first plaintiff to withdraw from circulation all copies of the calendar bearing the second plaintiff's name and to undertake not to use the second plaintiff's name thereafter. If he was unwilling to give this undertaking, the first defendant proposed to rescind the contract. At the time when this notice was sent, the first defendant had already received two small advances in respect of the almanac for the year Dharana, 1944. The first plaintiff replied to this notice denying that there was any understanding that no other person's name should appear on the almanac and claiming the right to assign to the second plaintiff. On 27th August, 1943, the first plaintiff sent a money order for Rs. 80 due to the first defendant under the contract. This money order was refused whereupon the first plaintiff filed a suit against the first defendant, O. S. No. 403 of 1943 out of which Second Appeal No. 750 of 1945 arises. In that suit the individual whom we have referred to as the second plaintiff was not a party, and the suit as originally framed sought relief only against the first defendant, the prayer being for specific performance of the contract to supply manuscripts of the panchangam for the three years for which the agreement still had to run, or alternatively to pay Rs. 900 as damages for breach of the contract. The first plaintiff also filed an application in which he prayed for an injunction restraining the first defendant from getting his manuscript published by any one else. In opposition to that injunction application, the first defendant filed a counter-affidavit in which he asserted his physical inability to continue the production of the panchangam and stated that his grandson, the second defendant, was now casting a panchangam which was to be published by the third defendant under an agreement, dated 20th August, 1943. As a consequence of this statement, the plaintiff amended his plaint by adding a paragraph referring to the first defendant's counter-affidavit and alleging that the second defendant was incapable of casting a panchangam and that the first defendant was seeking to circumvent the agreement and interim injunction by publishing his panchangam in the name of the second defendant through the agency of the third defendant, who is alleged to have purchased the right to publish it when fully aware of the suit agreement. A prayer was also added that the defendants be restrained from publishing the Tamil Vakya Panchangam for the years covered by the agreement either in their own names or in the names of other persons, and damages were sought from all the defendants.

It is to be noted that there is no assertion in the plaint as amended that the third defendant had been instrumental in causing the first defendant to break his

contract with the plaintiff. The only assertion is that the third defendant knowing of the agreement between the first defendant and the first plaintiff was attempting to publish the first defendant's panchangam under the name of the second defendant. While this suit was pending, the third defendant did publish a panchangam for the year Dharana. The publication was got up in a manner very similar to that of the previous years' almanacs even to the extent of continuing the number of the series. Whereas the previous almanacs described the work as that of Venkatagurunatha Sastri, son of Ramalinga Joshier, the third defendant's publication printed these two names in large type adding in small type the name of the second defendant described as grandson of the first defendant.

This suit went to trial and resulted in a decision that the first defendant had committed breach of the contract and that there was no ground on which a decree for specific performance or injunction could be granted, especially as the third defendant had given an undertaking on the interim injunction petition to keep regular accounts of the sale of his panchangam and not to sell more than 5,000 copies out of the 15,350 which he had printed. On the question of damages, the trial Court held that the loss may be taken as Rs. 300 per annum, the figure mentioned in the plaint and that the third defendant knowing of the contract between the principal parties must have procured the breach thereof and fraudulently published the panchangam in collusion with the first and second defendants. The learned District Munsiff also found that no action could be taken under the Indian Copyright Act, because by section 13 of the Act, any proceeding regarding the infringement of the copyright had to be filed in a District Court. In the result he gave a decree for damages amounting to Rs. 300 for the first year against defendants 1 to 3 and Rs. 600 for the two remaining years against the first defendant alone. This decision was confirmed in appeal, and against the appellate decree Second Appeal No. 750 of 1945 is preferred. As already stated, the second plaintiff in the copyright suit was not a party to the contract suit, though he was the principal witness for the plaintiff and has been described by the trial Judge as the real plaintiff in the suit.

Three days after the judgment of the District Munsiff, in the contract suit, the two plaintiffs together filed O. S. No. 1 of 1944 in the District Court against all three defendants claiming that by the agreement Ex. P-1, dated 20th February, 1941, the first defendant had contracted to assign to the first plaintiff the exclusive right of publishing his Tinnevelly Vakya Panchangam for five years beginning on 13th April, 1942, that this agreement operated to assign the copyright in respect of each year's compilation, as and when the manuscript was ready, to the first plaintiff absolutely and that to the knowledge of the first defendant, the benefit of the agreement had belonged all along and still belonged to the second plaintiff. The plaint goes on to recite the facts regarding the interchange of notices in 1943 and the repudiation of the contract by the first defendant, and alleges that the first defendant's notice was sent at the instance of the third defendant who had arranged with the first defendant to publish the first defendant's almanac for the year Dharana in the name of the second defendant. The plaint alleges that in the suit for damages, the amount claimed was restricted to Rs. 300 because of the poverty of the first defendant. It quotes the finding of the District Munsiff in O. S. No. 403 of 1943 that the manuscript published by the third defendant as the work of the second defendant for the year Dharana was, in fact, the work of the first defendant and alleges that all three defendants had jointly infringed the copyright which was vested in the plaintiffs. The plaintiffs therefore prayed for an injunction to restrain the defendants from publishing any panchangam exhibiting in any manner the name of the first defendant for the two remaining years of the contract period and prayed for an account of the profits made by the third defendant by the sale of the panchangam for the year Dharana and the delivery of the unsold copies of this publication. This suit was tried by the District Judge along with the hearing of the appeal from the decree of the District Munsiff, the evidence taken by the District Munsiff being by consent treated as the evidence in the copyright suit. The latter suit resulted in a decree

for the payment of Rs. 1,000 as damages by the third defendant on the basis of the estimated profits from the sale of the panchangam for the year Dharana, and there was an injunction restraining the defendants from publishing any panchangam for the two remaining years. The unpublished-copies had already been surrendered.

Against this decision Appeal No. 301 of 1945 has been preferred by the third defendant who is also the appellant in the connected second appeal. As the two appeals involve the same evidence, they have been heard together. The plaintiffs have settled both the actions with the first and second defendants, and the last two years of the period covered by the agreement having elapsed, there is no longer any question of an injunction. We are now concerned only with the decrees against the appellant-third defendant for damages.

We find it difficult to sustain the decree against the appellant in the second appeal. Although in the copyright suit there is some assertion that the appellant had procured the breach of the contract by the first defendant, no such assertion is found in the plaint in O. S. No. 403 of 1943, where all that is alleged is that the third defendant with the knowledge of the contract had arranged with the first defendant to publish the first defendant's manuscript which under the contract should have been delivered to the first plaintiff. We have been taken through the evidence in the case, and the respondents have been unable to indicate any substantial evidence that it was at the instance of the third defendant-appellant that the first defendant broke the contract. The truth seems to be that it was after the first defendant had repudiated his contract with the first plaintiff that he induced the third defendant to publish the first defendant's manuscript in the name of the second defendant. No doubt the third defendant must have known that the first defendant was acting in breach of his contract with the first plaintiff; but the third defendant was not a party to that contract, and unless it is both pleaded and proved that the third defendant instigated or procured the breach of the contract, he cannot be made liable in damages for the first defendant's breach. In this view, we allow Second Appeal No. 750 of 1945 with costs throughout and dismiss the suit as against the third defendant.

The question arising in the copyright suit require more detailed consideration. It is contended for the appellant, firstly, that the agreement Ex. P-1 does not purport to assign the copyright at all; secondly, that a mere contract to assign the copyright in an unwritten work cannot support an action against the alleged assignee for infringement of copyright. Thirdly it is contended that this panchangam is not a literary work in respect of which copyright exists. Fourthly, it is contended that the suit under the Copyright Act is barred by reason of the adjudication on a similar claim in the earlier suit. Fifthly, it is contended that the decree in the earlier suit proceeds on the basis that the contract between the parties has come to an end, and therefore there can be no foundation for the plaintiffs' claim as owners of the copyright; and lastly the appellant challenges the estimate of the profits of his publication, and contends that in any case credit should have been allowed for the amount of damages decreed against him in the earlier suit.

It will be convenient to summarise the relevant provisions of the statutory law on the subject of the existence and transfer of copyright. The Indian Copyright Act, 1914, limits the application of the English Copyright Act, 1911, to India in certain respects with which we are not concerned and provides under section 13 that "every suit or other civil proceeding regarding infringement of copyright shall be instituted and tried in the High Court or the Court of the District Judge." Section 1 of the English Copyright Act, 1911, recognises the existence of copyright in every original literary, dramatic, musical and artistic work subject to certain restrictions regarding the place of publication of published works and the nationality of the authors of unpublished work, and copyright is defined as "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, ... ; if the work is unpublished, to publish the work or any substantial part thereof." By section 2, copyright in a work is deemed to be infringed by any person who, without the consent of the owner of

the copyright, does anything the sole right to do which by this Act is conferred on the owner of the copyright. Section 5 provides that "subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein." Sub-section (2) of section 5 provides :

"The owner of the copyright in any work may assign the right, either wholly or partially, ... either for the whole term of the copyright or for any part thereof and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent."

Section 31 provides that :

"No person shall be entitled to copyright or any similar right in any literary, dramatic, musical or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence."

Section 35 (1) of the Act provides that "unless the context requires otherwise, 'Literary work' includes maps, charts, plans, tables, and compilations."

It is not contended and cannot, we think, be contended that there has by reason of the agreement, Ex. P-1, been a legal assignment of the copyright in the Tinnevelly Vakya Panchangam for the three years with which we are now concerned. Such an assignment could only be made by an instrument in writing signed by the owner thereof, and there can be no ownership of the copyright for a non-existent work ; and it is not denied that at the time of this agreement the panchangams for the three years with which we are concerned had not been written. The respondents, however, contend that the effect of this agreement is to create an equitable right which would operate as an equitable assignment of each manuscript as and when it comes into existence, and that the publication of such a manuscript by a third party can be challenged as an infringement of copyright by them as the equitable assignees, provided that they join the legal owner of the copyright in the action.

It will be convenient first to deal with the contention that Ex. P-1 does not purport to create any rights whether by way of equitable assignment or otherwise in the copyright of the first defendant's work. We are unable to accept this contention. The agreement stipulates for the preparation of manuscripts by the first defendant on certain clearly indicated lines and the delivery of each manuscript, as it is completed, to the first plaintiff, and it prohibits the delivery of such a work to anybody else. The combined effect of these provisions is to confer upon the first plaintiff the sole right of publishing the three panchangams which the first defendant is to write for the three specified years, that is to say, the first plaintiff is given "the sole right to produce or reproduce" these works and such a right is nothing more than a copyright.

We can also deal briefly with the contention that an action for infringement of copyright cannot be maintained because the decree in the earlier suit put an end to the contract between the parties so that the plaintiffs ceased to be the equitable assignees of the copyright. The fallacy of this contention lies in the fact that the copyright suit claims damages for an infringement alleged to have been committed while the earlier suit was under preparation. At that time, if the plaintiffs had, in fact, acquired the sole right to publish the first defendant's panchangam for the year Dharana, they must be entitled to sue for damages for the infringement of that right by the third defendant, notwithstanding the fact that as against the first defendant, the plaintiffs have successfully claimed damages for the breach of the contract which led to the infringement.

We do not think that there is any difficulty in coming to the conclusion that the Tamil Vakya Panchangam is a literary work for the purpose of the Copyright Act. In dealing with the question of the degree of originality necessary to constitute original literary work for the purpose of the Copyright Act, 1911, the Privy Council in the case of *Macmillan & Co., Ltd.* v. *Cooper*[1] observed :

1. (1923) 46 M.L.J. 637 : L.R. 57 I.A. 109 : I.L.R. 48 Bom. 308 (P.C.).

". . . . . . . it is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material."

Then again at page 327 quoting the observations of Peterson, J., in *University of London Press, Limited* v. *University Tutorial Press, Limited*[1] their Lordships approved the following passage in connection with the meaning of the words " original literary work " in section 1. sub-section (1) of the Act of 1911 :

"The word ' original ' does not in this connction mean that the work must be the expression of the original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of ' literary work ' with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author."

Their Lordships go on to state :

" What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act, 1911, cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree."

The appellant on this part of the case has relied strongly on the decision of *G. A. Cramp & Sons, Ltd.* v. *Frank Smythson, Ltd.*[2]. That was a case in which copyright was claimed for an ordinary diary containing a calendar and a certain amount of information regarding postal rates, weights and measures, lighting up times and so on. The Lord Chancellor after quoting the observations of Lord Atkinson in the case just cited came to the conclusion that copyright had not been established for the diary in question which was a mere calendar with the addition of a certain amount of miscellaneous information, all accessible in official publications and a feature of all diaries of the kind.

The learned Lord Chancellor observes :

" There would, indeed, as it seems to me, be considerable difficulty in successfully contending that ordinary tables which can be got from, or checked by, the postal guide or the Nautical Almanac are a subject of copyright as being original literary work. One of the essential qualities of such tables is that they should be accurate, so that there is no question of variation in what is stated. The sun does in fact rise, and the moon set, at times which have been calculated, and the utmost that a table can do on such a subject is to state the result accurately. There is so far no room for taste or judgment. There remains, I agree, the element of choice as to what information should be given, and the respondents contend that the test of originality is satisfied by the choice of the tables inserted ; but the bundle of information furnished in the respondents' diary is common place information which is ordinarily useful and is, at any rate to a large extent, commonly found prefixed to diaries and, looking through the respondent's collection of tables, I have difficulty in seeing how such tables, in the combination in which they appear in the respondents' 1933 diary, can reasonably claim to be " original work ". There was no evidence that any of these tables was composed specially for the respondents' diary. There was no feature of them which could be pointed out as novel or specially meritorious or ingenious from the point of view of the judgment or skill of the compiler. It was not suggested that there was any element of originality or skill in the order in which the tables were arranged. My own conclusion is that the selection did not constitute an original literary work."

Now, if the Tinnevelly Vakya Panchangam was nothing more than handy extract from published official tables, the reasoning of the Lord Chancellor in the case just cited might well be applicable ; but the evidence in this case does show that this panchangam is an original composition worked out by a series of calculations based on a fairly elaborate set of rules in the knowledge of which the first defendant is an admitted specialist. He does not compile his panchangam by copying information from other publications. He has a specialised knowledge of a fairly elaborate system for working out these matters year by year, and it is the result of his own calculations made with reference to the particular locality that enables him to fix not only the dates but the precise hour and minute for the

1. (1916) 2 Ch. 601. 2. (1944) A.C. 329.

commencement and termination of each particular period, the fixation of which is essential in order to know the proper time for performing a particular ceremony or celebrating a particular festival or for casting the horoscope of a person born on a particular date and hour. We have, therefore, no difficulty in holding that the work in question is an original literary work for the purpose of the Copyright Act, 1911.

Having decided that the panchangam in question is a work in which copyright exists and having decided that the agreement, Ex. P-1, binds the first defendant to transfer to the first plaintiff the copyright in the manuscript of that work in each succeeding year as soon as that manuscript is completed, we will next consider whether the plaintiffs as equitable assignees of the copyright of the first defendant's panchangam for the year Dharana can maintain an action for damages for infringement of their copyright by the third defendant on the basis that they have joined in that action the legal owner of the copyright. On this question, the decision of the House of Lords in *Performing Right Society, Ltd.* v. *London Theatre of Varieties, Ltd.*[1], is the leading authority. The question at issue in that case was not precisely the question just formulated. The plaintiffs in that case were a company which alleged an infringement of their copyright in certain musical works. They had taken assignments from the firms of Messrs. Chappell & Co. and Keith, Prowse & Co., of the right of performance of every song or musical work then belonging to or which might thereafter be acquired by the said firms. The songs in question were admittedly not in existence on the date of the contracts. The plaintiffs, when objection was taken to the maintenance of the action in the absence of the legal owners of the copyrights, elected to fight the case on the contention that the presence of the legal owners as parties to the action was unnecessary. It was held by the Court of Appeal that as the plaintiff's interest in the songs was purely equitable and as the defendants were mere infringers claiming no interest thereof, the plaintiffs were not entitled to maintain the action in their own names without joining the owners of the copyright, and this decision was confirmed by the House of Lords. The importance of this decision for the purpose of the present case is that the learned judges of the Court of Appeal and the majority of their Lordships who decided the matter in the House of Lords were of opinion that the action could have been maintained if the plaintiffs as equitable assignees had joined the legal owners of the copyright as parties. In the judgment of the Court of Appeal, Bankes, L.J., says:

"I can see nothing in the statute from which I can draw the inference that an owner of copyright, whether the first owner, or any subsequent owner by legal assignment, ceases to be an owner within the meaning of the statute when he executes an equitable assignment of the whole or part of his right. If this is so it follows either (a) that the equitable assignee is not an owner at all within the meaning of the statute, or (b) that the statute recognises under these circumstances two owners, the legal and the equitable, of the one right. Whichever view is correct, it appears to me that apart from authority the result in this action is the same—namely, that the plaintiffs should not be allowed to maintain the present action without adding the legal owners of the copyright. If the first conclusion is the correct one then the action cannot proceed without them. If the second is correct then the Court in the exercise of its discretion should not allow the action to proceed in the absence of a party who may be interested and who ought to be bound, or whose presence might afford a defence to the defendants. There are difficulties in the way of accepting either conclusion, but the difficulty of accepting the second appears to me to be less than that of accepting the first. If the first is accepted the logical conclusion appears to be that no equitable assignee of copyright can ever maintain a claim for infringement in either a Court of law or equity, because the Act of Parliament only recognises the owner as the person who can claim the assistance of the Courts, and on this assumption the equitable assignee is not the owner, and can never become the owner unless and until it either becomes possible for the owner to make a legal assignment of the right, or he can be persuaded or compelled by process of law to make such an assignment. I do not think that the language of the statute justifies such a conclusion, and I prefer a construction which includes the equitable owner in the expression 'owner' and then leaves it to the ordinary practice of the Courts to secure all proper parties being before the Court."

Younger, L.J., after pointing out how under the law as it existed before the Judicature Act the owner of the equitable title could compel the legal owner to permit the use of his name at law in an action against an invader of the right or might even

1. (1924) A.C. 1.

have compelled the defendant in equity to admit at law the legal title of the equitable owner, comes to the conclusion that it was not to be expected that an enabling statute like the Copyright Act, 1911, would take away from any class of persons interested in a copyright a right of action enjoyed by them under the statute which it superseded.

In the House of Lords, Viscount Cave, L.C., came to the conclusion that the appellants could not claim to be assignees, whether legal or equitable, of the songs then in question by reason of the instrument which was signed when their songs were not in existence ; but he observed :

> "The appellants have a right in equity to have the performing rights assigned to them and in that sense are equitable owners of those rights ; but they are not assignees of the rights within the meaning of the statute."

He goes on to observe :

> "That an equitable owner may commence proceedings alone, and may obtain interim protection in the form of an interlocutory injunction, is not in doubt ; but it was always the rule of the Court of Chancery, and is, I think, the rule of the Supreme Court, that in general, when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action :"

Viscount Finlay observed :

> "In my opinion, the power of assignment given by the fifth section is not confined to an assignment of the legal property, but will apply to the transfer of any interest, whether legal or equitable . . . . The society became entitled to sue in respect of the interests so acquired, but their right to sue is subject to the general rule that the owner of the legal estate should be joined as a party."

Lord Atkinson takes a somewhat different view. He observes :

> "When one reads through all the provisions of this statute and realizes how almost every state of things, every event and contingency, is dealt with and provided for, one is, I think, reasonably led to the conclusion that the supplementary provisions contained in section 31 were designed to deprive every person of copyright to whom it was not secured by the provisions of the Act of 1911, or by those of some other statute for the time being in force. It is, in my view, impossible to suppose that the mode of acquisition of an equitable interest in copyright under a grant or licence made or given before the author's work or the copyright in it is in existence would have been left unnoticed or unprovided for by this statute as it has been, if it had not been intended to exclude and, impliedly, to prohibit it."

Lord Sumner however observes :

> "A remedy is conferred by our present law on equitable owners, subject to compliance with certain legal requirements, and the owner of copyright is entitled to all remedies. I can find nothing to show any intention in the Act to ignore equitable rights throughout so wide and important a subject as copyright, nor, in view of the long history of equitable rights and of the enactment in favour of the rules of equity contained in the Judicature Act, 1873, does it seem practicable to hold that the words 'owner' in section 6, sub-section 1, and 'title' in section 6, sub-section 3, mean exclusively legal owner and legal title as those terms were theretofore understood. So limited a meaning of the words would not be a natural one to place on legal language enacted in 1911."

Later on, he concludes :

> "I think that the statute leaves equitable assignees to enjoy such position as is given to them by the general law, when they require to vindicate the right, which the Copyright Act, 1911, expressly confers and regulates."

Lord Phillimore takes the stricter view which was taken by Lord Atkinson, and he is of opinion that the grant of a mere equitable right which is not an assignment of the copyright is not sufficient to support an action for breach of copyright against a third party. It will thus be seen that the majority of their Lordships agree with the Court of Appeal in holding that a person who has an equitable right to compel a legal owner to assign a copyright can maintain an action for breach of copyright if he joins the legal owner in that action. In Halsbury's Laws of England, Second Edition, Volume 7, paragraph 871 the position resulting from this decision is summarised as follows :

> "An agreement to assign a work not yet in existence, and an agreement which contemplates that a further document of assignment is to be executed have been held to take effect as equitable assignments.

An equitable assignee cannot sue in his own name in respect of infringement of the right assigned, but must make the assignor a party to the action."

Copinger on the Law of Copyright, Seventh Edition, page 99 dealing with sub-section 3 of section 5 of the Copyright Act, 1911, states:

"This section has no application to a document purporting to assign a non-existent work, since such a document cannot be signed by the owner of the right therein, and the author is to be the first owner of the copyright in a work. Consequently, although such a document might be enforced as an equitable assignment, it would not entitle the assignee to sue for infringement without joining the author or legal owner."

On this state of the authorities, we are constrained to hold that the first plaintiff having by reason of the agreement, Ex. P-1, become the equitable owner of the copyright in the first defendant's panchangam for the year Dharana, as soon as the work came into existence, is entitled to maintain the suit, he having impleaded not only the second plaintiff who is claiming an interest in the rights but also the first defendant who was the legal owner of the copyright at the relevant dates.

There remains the question of the amount of damages. On this question, the appellant relies mainly on a statement made by the first plaintiff in his plaint in the earlier suit in paragraph (9) where he says:

"The publication of the Tinnevelly Vakya Panchangam is a profitable business and will yield a net profit of not less than Rs. 300 per annum to the plaintiff."

In the plaint in the copyright suit he has, as already indicated, explained this statement by saying that he was limiting his claim for damages in view of the poverty of the first defendant. He has adduced positive evidence from the printer employed by the third defendant regarding the actual cost of printing the third defendant's panchangam. The rate of commission allowed to the retailers is not in dispute, and the number of copies sold is also established. On the basis of these figures and allowing a substantial margin for contingencies the learned District Judge has estimated the profit of the third defendant from the sale of the panchangam at Rs. 1,000. The third defendant's own evidence on the subject is frankly incredible. He states that the cost of printing 15,300 copies was Rs. 4,000, that is to say, an amount approximately equal to the gross sale price of the edition. He has not produced the accounts which he was directed to maintain in the proceedings for an *ad interim* injunction; nor has he restricted his sales to the 5,000 copies which he was then authorised to sell. He has produced practically no materials to set against the detailed evidence adduced for the plaintiffs. On this state of the evidence, we see no reason to differ from the conclusion of the learned District Judge. In view of our decision in Second Appeal No. 750 of 1945, the question of allowing the appellant credit for the amount of damages awarded in that suit no longer arises.

The result therefore is that Appeal No. 301 of 1945 is dismissed with costs of the plaintiffs. Half the cost of printing the evidence will be apportioned to each of the two appeals.

K.S. *Appeal No. 301 of 1945 dismissed and Second Appeal No. 750 of 1945 allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Sivakami Ammal .. *Appellant**

v.

C. Ganapathia Pillai and another .. *Respondents.*

Estoppel—Execution of a decree by sale of property by a Municipality—Subsisting charge in its favour not notified—Municipality estopped from asserting any claim to bring that property to sale under the subsequent charge as against the auction purchaser in execution of the first decree.

A party who obtains a decree against a property and brings it to sale when on the same property there is a subsisting charge in his favour, is bound to notify the existence of the charge for the benefit

* S.A. No. 1820 of 1945. 10th December, 1946.

of intending purchasers. The law is the same for Municipalities as for private persons. A Municipality does not cease to be a decree-holder because it is a Municipality.

Where at the time of bringing a property to sale in execution of a decree in a suit to enforce the statutory charge in respect of the arrears of property tax, the Municipality fails to notify the existence of another similar decree which it had in the meantime obtained in respect of arrears of taxes for the subsequent years, the Municipality by its failure is estopped as against the auction purchaser in execution of the earlier decree from asserting any claim to bring the property to sale in enforcement of the charge for the subsequent years. An auction purchaser in execution of the later decree cannot resist the claim for possession of the auction purchaser in execution of the earlier decree.

Jagannatha v. *Gangi Reddi*, (1892) I.L.R. 15 Mad. 303; *Kasturi* v. *Venkatachalapathi*, (1892) I.L.R. 15 Mad. 412 and *Giriya Shetti* v. *Ansthamma Shettithi*, (1926) 52 M.L.J. 222, referred to.

Nawal Kishore v. *The Municipal Board, Agra*, I.L.R. 1943 All. 453 (F.B.), distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Madura in A.S. No. 36 of 1945 preferred against the decree of the Court of the District Munsiff of Madura Town in O.S. No. 50 of 1944.

T. L. Venkatarama Aiyar for Appellant.

V. Seshadri and *K. S. Ramamurthi* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. The suit was to set aside the order passed by the District Munsiff, Madura Town, In E.A. No. 887 of 1943, which was an application filed by the plaintiff under Order 21, rule 97 of the Code of Civil Procedure. The facts are not in dispute but it is necessary to state them to appreciate the contention of the parties in this appeal. The subject-matter of the suit is a house in Madura Town which was owned by the 2nd defendant who is the husband of the plaintiff. The Madura Municipality sued the 2nd defendant in O.S. No. 396 of 1934 on the file of the District Munsiff's Court of Madura Town and obtained a decree. That suit was to enforce the statutory charge in respect of the arrears of property tax for the years 1931 to 1933. Though the decree was obtained in 1934 the house was brought to sale only on 21st October, 1940 and the plaintiff became the purchaser at the Court sale. A sale certificate was issued to her on 28th November, 1940. Meanwhile the Municipality had brought another suit against the 2nd defendant for arrears of property tax for the years 1934 to 1937 and obtained a decree in August 1937. In spite of having obtained this decree in 1937 the Municipality did not mention the existence of the decree or the charge for the arrears of the years covered by the decree either in the sale proclamation or in execution proceedings in O.S. No. 396 of 1934. Though the plaintiff became the purchaser on 21st October, 1940, she did not succeed in obtaining delivery of the property which was first obstructed by her husband's brother and brother's son and though she obtained an order for removal of obstruction by them there was again difficulty in obtaining possession. On 15th December, 1941, the 1st defendant who is the contesting respondent here became the purchaser of the same property in execution of the decree in O.S. No. 146 of 1937. Though by the date of the execution proceedings the plaintiff had become the purchaser of the property the Municipality as a decree-holder did not choose to bring on record the plaintiff in the execution proceedings. The sale in favour of the first defendant was therefore in proceedings of which the plaintiff had no notice. When the plaintiff eventually filed E.A. No. 887 of 1943 under Order 21, rule 97 of the Code of Civil Procedure, there was obstruction by the first defendant claiming under his purchase in execution of the decree in O.S. No. 146 of 1937. The plaintiff's application was dismissed. Hence she was obliged to file the suit out of which the present second appeal arises, to set aside that order and obtain a declaration of title to the property. The learned District Munsiff of Madura decreed the suit. It is not necessary to give the reasons for his decision. On appeal by the 1st defendant the learned Subordinate Judge of Madura reversed the decision of the learned District Munsiff and dismissed the suit. The plaintiff has therefore filed the second appeal. Though there are several grounds raised by the appellant in her Memorandum of Appeal, I have heard her learned counsel only on one point, as in my opinion, the appeal can be disposed of on that point.

It is contended for the appellant that when the suit property was proclaimed for sale in execution of the decree in O.S. No. 396 of 1934 in E.P. No. 662 of 1939 the Municipality who was the decree-holder in that suit failed to notify the decree which they had obtained in O.S. No. 146 of 1937 and the charge they had on the property for the arrears of property tax for the years 1934 to 1937. The fact of this omission is of course not disputed, but the learned advocate for the appellant contends that on account of the failure to notify the existence of the subsisting charge for subsequent years the Municipality is estopped as against the auction-purchaser, *i.e.*, the plaintiff, from asserting any claim to bring the property to sale in enforcement of the charge for the subsequent years. He relied upon two rulings reported in I.L.R. 15 Mad., in the first of which *Jagannotha* v. *Gangi Reddi*[1] the plaintiff attached the property and brought it to sale in execution of a decree against the 1st defendant and the other defendants purchased at the Court sale, the property. The plaintiff had at the time a mortgage over the same property. But notice of his mortgage was not given in the execution proceedings. When the plaintiff sued to realise his security under the mortgage by sale of the premises which were in the possession of the auction-purchasers, it was held by the learned judges that the plaintiff was estopped from setting up his claim because he had allowed the auction-purchasers to buy without notice of the mortgage in his favour. The other decision in *Kasturi* v. *Venkatachalapathi*[2] lays down a similar proposition. The learned Judges there say as follows:

> "The ground of decision is that it was plaintiff who led intending purchasers to believe that the property was offered for sale free of encumbrances, and that plaintiff by concealing the existence of a lien, of which he was aware, led the purchaser to pay full value for the property."

The same rule of estoppel, as was enunciated in these two rulings was applied in *Giriya Shetti* v. *Anathamma Shettithi*[3], a case where a lessor sought to proceed against the property which he had brought to sale in execution of a decree obtained by him for arrears of rent for a particular year for the arrears due thereon for the next year which had fallen due by the time of the sale in execution of the first suit and which remained unpaid. Curgenven, J., held that the existence of the arrears of rent for the subsequent year not having been disclosed in the sale proclamation the purchaser at the Court sale was not liable to pay that amount. The decision in *Kasturi* v. *Venkatachalapathi*[2] was followed.

In the lower Courts reliance appears to have been placed on a decision of the Full Bench of the Allahabad High Court reported in *Nawal Kishore* v. *The Municipal Board, Agra*[4]. But they appear to have overlooked the important distinction between the facts of the case before the Allahabad High Court and the present case. In the Allahabad case in execution of a decree which one 'N' obtained against 'S' certain premises owned by 'S' were brought to sale and sold by public auction and were purchased by the decree-holder himself. At the time the sale took place the house tax and water rate were in arrears but the purchaser was not aware. It was held that the municipal tax would not cease to be a first charge on the property merely because they were not notified in the sale proclamation. That was a case where the municipality was held not tohave lost its statutory first charge because of an omission by a third party decree-holder to mention the subsistence of the charge in favour of the municipality in execution proceedings taken by him. But in the present case it is the Municipal Council which brought to sale the property in execution in the first instance in O.S. No. 396 of 1934 and it was the same Municipality which again brought the property to sale in execution of the subsequent decree obtained by it. In the Allahabad case there could not be any question of estoppel because it was not the Municipality that was guilty of any omission. The Municipality was not a party to the decree in which the plaintiff became a purchaser.

Learned advocate for the contesting respondents, *i.e.*, the first defendant, in my opinion, did not meet this argument but put forward a contention that the successive

1. (1892) I.L.R. 15 Mad. 303.
2. (1892) I.L.R. 15 Mad. 412.
3. (1926) 52 M.L.J. 222.
4. I.L.R. (1943) All. 453 (F.B.)

charges in favour of the Municipality can be enforced by successive sales. Learned advocate for the appellant never contested this, nor was it necessary for him to so contest. It is too well established to admit of any doubt that the Municipality gets the benefit of successive charges in respect of arrears of rent for successive periods. Undoubtedly the same property can be brought to sale any number of times for the arrears for different periods. It is also true that in each case the arrears are the first charge subject to government revenue. But all this is beside the point. The real question in this case has nothing to do with the rights of the Municipality as a Municipality. The question is whether a party, who obtains a decree against a property and brings it to sale when on the same property there is a subsisting charge, is bound to notify the existence of that charge for the benefit of the intending purchasers. The law is the same for municipalities as for private persons. A municipality does not cease to be a decree-holder because it is a Municipality.

It is because this point was overlooked that the learned advocate for the respondent urged another contention justifying the action of the Municipality in not bringing on record in the second suit the plaintiff who had become, to their knowledge, the purchaser in execution of the decree in O. S. No. 396 of 1934. The learned advocate contended that under section 88 of the District Municipalities Act it was the duty of the transferee to have given notice to the Municipality of the transfer, and if he had not done so the Municipality was not bound to bring him on record in subsequent proceedings. But unfortunately this is mixing up two things, *viz.*, the rights and powers of a Municipality as a statutory body having specific powers conferred by the statute and the Municipality as a decree-holder. The effect of not giving a notice under section 88 (1) is stated in the other sub-section of that section itself which has no bearing on the question in issue in this case but has only a bearing on the liability for payment of subsequent taxes. The municipality, in my opinion, was bound both to have notified the existence of the charge and the decree for arrears for subsequent years in the execution proceedings in O. S. No. 396 of 1934, *i.e.*, in E. P. No. 662 of 1939 as well as to have brought on record the plaintiff in E. P. No. 900 of 1941 in the second suit by which date to its knowledge the plaintiff had become the purchaser of the property which they were bringing to sale. Not having done either I am clearly of opinion that no act of theirs in the subsequent execution proceedings could adversely affect the title obtained by the plaintiff by virtue of her purchase in E. P. No. 662 of 1939. It was suggested that though there may be an estoppel as against the Municipality there could be no estoppel against the auction-purchaser but no authority has been cited for this position and I do not agree with this contention.

The decree of the lower appellate Court is set aside and the decree of the learned District Munsiff of Madura Town is restored with costs throughout.

Leave refused.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

Nataraja Pillai .. *Petitioner**

v.

U. Narayanaswami Iyer .. *Respondent.*

Limitation Act (IX of 1908), Article 182 (5)—Final order—What would amount to—Order for return of execution petition for furnishing particulars—Return not taken—Subsequent order rejecting execution petition—If a 'final order'—Orders rejecting execution petitions on decree-holder failing to comply with the Court's requirements—Final orders sufficient to save limitation.

Where an execution petition is ordered to be returned for supplying certain information within the time given but the decree-holder does not in fact take the return of the petition from the Court and the Court thereupon rejects the petition on a subsequent date, the order of rejection would be a 'final order' on a subsisting petition for the purpose of saving limitation.

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* C.R.P. No. 509 of 1946. 7th March, 1947.

Where though the decree-holder might have neglected to comply with the Court's requirements in regard to the execution petitions, their ultimate rejection by the Court for such non-compliance would be final orders sufficient to save limitation for the succeeding petitions.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Negapatam, dated 25th February, 1946, in E. P. No. 225 of 1945 in S. C. No. 409 of 1934.

R. Somasundara Aiyar for Petitioner.

K. V. Ramachandra Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This petition raises a question of limitation in execution. A decree was obtained on 4th May, 1934. The first execution petition was filed on 4th May, 1937. The Court ordered its return on 21st June, 1937, for supplying certain information, giving time till 3rd July, 1937. In fact, the decree-holder did not take a return of the petition with the result that on 16th July, 1937, the petition was rejected by the Court. It is contended that this order of rejection cannot be treated as a final order on a petition in accordance with law on the ground that, after the order for return had been ordered and the time had expired, the petition had no legal existence, the argument being based on the decision in *Kadir Sahib* v. *Viswanatha Iyer*[1]. The present case is identical with that dealt with by King, J., in *Parankusa Naidu* v. *Ayyanna Naidu*[2]. In that case the learned Judge distinguished the Bench decision just cited and pointed out that there was no question of intermediate negligence and subsequent action on the part of the petitioner but it was a case in which the Court found the application within the Court precincts and determined to put an end to it. Whatever be the correct view when a petition is returned in fact to the decree-holder and he fails to represent it within the time allowed and the Court subsequently refuses to excuse the delay and rejects the petition, that is not the position here. It is a case of a petition the return of which was ordered by Court but was never effected. The Court consequently passed an order on the petition dismissing it for the neglect of the decree-holder, and that seems to me to be a final order on a subsisting petition.

The second execution petition was presented on the 3rd June, 1940, that is to say, within three years of the rejection of the first petition. It was returned on 6th June, 1940, for certain particulars, amongst them a list of moveables. It was eventually represented without complying with the requirements, request being made that the petition be recorded and the Court thereupon dismissed the petition. It is argued that this is not a final order on a petition presented in accordance with law on the ground that Order 21, rule 12 of the Civil Procedure Code requires a decree-holder to annex to the application an inventory of the moveable property to be attached. We are asked to infer from the return (1) that this is a petition to which rule 12 would apply, and (2) that the decree-holder had not complied with rule 12. It does not appear however that this was a case of attachment of moveable property belonging to the judgment-debtor but not in his possession. That being so, Order 21, rule 12 has no application, and there seems to be no reason for holding that this second execution petition was not in accordance with law.

There were two subsequent execution petitions prior to the one now under consideration, both of which were rejected for non-compliance with directions to furnish certain particulars. No doubt the decree-holder has neglected to comply with the Court's requirements on numerous occasions, but that surely is not the question. Each of these four execution petitions, in my opinion, ended with a final order which is sufficient to save limitation for the succeeding petitions.

The revision petition is dismissed with costs.

V.S. ——— *Petition dismissed.*

1. (1942) 2 M.L.J. 768 : I.L.R. 1943 Mad. 357. 2. (1943) 1 M.L.J. 445.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. FREDERICK WILLIAM GENTLE, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Khaja Hassanulla Khan, Sajja-da-Nishin of Royal Mosque, Rajahmundry .. *Appellant**

v.

Royal Mosque Trust Board by its President, Khan Bahadur Abdul Aziz Sahib .. *Respondent.*

Civil Procedure Code (V of 1908), section 92—Decree in scheme suit framing scheme—Effect—Right of person not a party to the suit to agitate his claims in respect of the institution and its properties.

A decree in a scheme suit under section 92, Civil Procedure Code, has the effect of preventing any one, whether a party to the suit in which the decree was passed or not, from asserting any rights vested in him which conflict with or attack the scheme.

Where there is an obstruction when the trustees seek to obtain delivery of possession and the removal of the obstructor is ordered, it is not open to such obstructor to sue for a declaration of his rights in respect of the institution and its properties.

Ramados v. *Hanumantha Rao,* (1911) 21 M.L.J. 952 : I.L.R. 36 Mad. 364, followed.

Appeal against the decree of the District Court, East Godavari at Rajahmundry dated 2nd February, 1945, in O.S. No. 24 of 1944.

K. K. Pocker, N. Narasimham, N. Ramakrishnayya, M. A. Ghatala and *I. A. Salam* for Appellant.

G. Chandrasekhara Sastri for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The plaintiff is the appellant in this appeal which relates to a mosque known as the "Royal Mosque" in Rajahmundry. In respect of the mosque a scheme was framed under section 92 of the Code of Civil Procedure and decreed in 1930 by the learned Subordinate Judge's Court in O.S. No 46 of 1924, and the decree was upheld on appeal. The scheme vested the properties of the Royal Mosque and the control and administration of its affairs in a Board of trustees. The appellant was not a party to the scheme suit.

When the trustees sought to obtain possession of the mosque, in pursuance of the scheme decree, they were obstructed by one Sheikh Mowla and his tenant, a man named Hanumantha Rao, who claimed the right to occupy one room. The trustees instituted O.S. No. 23 of 1940 in the same Court against Hanumantha Rao for possession of the room and, ultimately, on appeal to this Court, possession was decreed. When the trustees applied for possession, they were obstructed by the present appellant. In E.A. No. 256 of 1943 for removal of the obstruction it was held that the appellant was a stranger to the mosque and the removal of the obstruction was ordered. The appellant then instituted the suit out of which this appeal arises. It was dismissed by the learned District Judge of East Godavari at Rajahmundry, and this is the plaintiff's appeal against the learned Judge's decision.

The appellant sued to set aside the order for removal of his obstruction, for a declaration of rights of permanent control, superintendence and governance over the affairs of the mosque and for possession of its properties.

The appellant alleges that he is the hereditary Khaji and Sajja-da-Nishin of the mosque; the property had been in uninterrupted, continuous and unobstructed possession and enjoyment of himself and his predecessors for more than the statutory period ; and they have been discharging their duties and obligations required by Mahomedan law. He further alleges that the mosque and its properties were endowed by ancient Mogul rulers and their successor, His Excellency the Nizam of Hyderabad continues to exercise spiritual sovereignty over the endowment.

* Appeal No. 596 of 1945. 21st March, 1947.

The appellant's claims are based upon a number of documents which are photostatic or certified copies of which were produced in the lower Court—Ex. P-2 (*a*), dated 1137 Hijri (corresponding to A.D. 1722), by which Emperor Mohammed Shaha granted to one Hafiz Abdul Razzack the village of Vella by way of inam in perpetuity; Ex. P-2 dated 1145 Hijri (corresponding to A.D. 1730), by which Emperor Mohamed Shaha granted to one Mohammed Hafi the office of Kazi of the Sirkar empowering him to administer various judicial and other functions; Ex. P-1, dated 1st April, 1864, Razinama decree passed by the District Civil Court of Rajahmundry, and Ex. P-4, dated the 23rd February, 1860, copy of an extract from the register of inams in the village of Korumilli in the taluk of Ramachandrapur in the district of Godavari.

In his evidence the appellant said that his son furnished him with these documents, by whom they were obtained; and he claims that he is a descendant of those in whose favour the grants and the decree were made and that he has inherited the rights which he seeks to have declared in his favour in the suit.

In his judgment the learned Judge in the Court below observed that the decree in the scheme suit is binding upon every one until it is set aside, and in face of that decree the appellant could not successfully assert the claims preferred in his plaint, in other words the decree in the scheme suit is, or has the effect of, a judgment *in rem* and it prevents any one, whether a party to the suit in which the decree was passed or not, from asserting any rights vested in him which conflict with or attack the scheme.

Having made the observations referred to, the learned Judge did not investigate or consider the appellant's claim and the documents upon which he based his suit but dismissed it, and consequently there has been no adjudication upon the merits. If it could be found that the learned Judge was wrong regarding the effect of the decree in the scheme suit, the matter would have to be remanded back for investigation of the facts and claims upon their merits. The question which requires decision, at the moment, is whether the learned Judge was correct in arriving at the conclusion that the appellant could not, in the light of the decree in the scheme suit, voice his claims before the Court.

In *Ramados* v. *Hanumantha Rao*[1], during the pendency of a scheme suit the guardian of a person applied to be made a party to it; the application was dismissed and a scheme was framed and decreed. Thereafter the person on whose behalf the application had been made by his guardian during minority sued to assert personal rights regarding the temple which had been the subject-matter of the scheme suit. It was held that a scheme framed under section 539 of the Code of 1882 (corresponding to section 92 of the Code of 1908) is binding on all, whether worshippers or not including even a person who might have claimed a hereditary trusteeship and have brought a suit to enforce such relief before the settlement of the scheme; a decree framing a scheme is a bar to a suit by such a person, even where his application to be made a party to the scheme suit has been rejected. At page 369 in the judgment of Sir Arnold White, C.J. and Phillips, J., it was observed that

> "this would seem to preclude suits between parties to establish a private right which, if established, would interfere with a charitable scheme settled by Court"

and later

> "ordinarily every person can be granted the relief to which he is entitled, but this principle cannot override the claims of the public and a charitable scheme settled by Court must be considered to have been settled for the benefit of the public."

That decision was expressed in 1911 some 36 years ago, and is one pronounced by a Division Bench of this Court.

Ramados's case[1] was referred to with approval and followed in *Sakharam Daji* v. *Ganu Raghu*[2], *Suraj Gir* v. *Bramh Narain*[3], *Vaithilinga* v. *Ramalingam Pillai*[4] and

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1. (1911) 21 M.L.J. 952 : I.L.R. 36 Mad. 364.
2. (1920) I.L.R. 45 Bom. 683.
3. A.I.R. 1946 All. 148.
4. (1916) 6 L.W. 9.

Mulukutla Ramamurthi v. *Chillara Bhaskarayya*[1]. Those decisions were pronounced by Division Benches, except *Mulukutla Ramamurthi's case*[1], which was a decision by a single Judge. In the case before the Allahabad High Court it would seem that some exception might arise, according to the observations at page 149 of the judgment, but only when the property which has been the subject of the scheme is not trust property at all. That is not the position in the present instance.

Since the decision in *Ramados's case*[2], which as stated, was given some 36 years ago, it has been referred to with approval and followed not only in this Court but also in two other High Courts, Bombay and Allahabad. No authority was cited in which the correctness of that decision has been challenged and wherever cited it would appear to have been accepted as correct. After the time which has elapsed since the principles were enunciated in *Ramados's case*[2] and in the light of the decision being followed wherever cited, it seems too late now to question its correctness.

In my view, therefore, it should be followed in the present instance, and applying that case to the appeal now before us, it follows that the appellant is not entitled, by the suit out of which this appeal arises, to assert the claims which he makes. The learned Judge in the Court below was correct in dismissing the proceedings before him. This appeal must be dismissed with costs.

Patanjali Sastri, J.—I agree. The appellant's counsel urged that the decision in *Ramados* v. *Hanumantha Rao*[2] should be reconsidered as the remedy suggested therein, *viz.*, inducing the Collector to ask for modification of the Court's scheme by taking action under section 92 of the Code of Civil Procedure will in practice prove illusory and the appellant would be left without any effective means of establishing his alleged private right of control and superintendence over the mosque and its endowments. This may well be so, but, as pointed out by my Lord, the decision in *Ramados's case*[2], has stood unchallenged for all these years and has been followed in this and some of the other High Courts in India and it seems too late now to question its authority.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE LAKSHMANA RAO.

T. M. P. Devasenambal Ammal .. *Appellant**

v.

The Board of Commissioners for the Hindu Religious Endowments Board, Madras .. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927), sections 9 (3) and 77 (2)—Application to set aside order passed under section 77 (1)—Forum—Presentation to wrong Court—Duty of that Court.

An application under section 77 (2) of the Madras Hindu Religious Endowments Act to set aside an order passed by the Board under section 77 (1) of the Act should according to section 9 (3) of the Act be made to the Court of the District Judge within whose jurisdiction the object of the endowment is situated. When such an application which has to be made to the District Court of Tinnevelly is wrongly presented to the City Civil Judge, Madras, it has to be returned for presentation to the proper Court and cannot be dismissed.

Appeal against the decree of the City Civil Court, Madras, dated 26th April 1945, in O.S. No. 108 of 1944.

K. S. Sankara Aiyar for Appellant.

K. Subba Rao and *M. Chockalingam* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant applied to the Madras Hindu Religious Endowments Board under sub-section (1) of section 77 of the Madras Hindu Religious Endowments

1. (1918) 50 I.C. 58.
2. (1911) 21 M.L.J. 952 : I.L.R. 36 Mad. 364.

* C. C. C. A. No. 48 of 1946. 25th March, 1947.

Act, 1926, for making an allocation of the income of the endowment in question and an order was passed by the Board that no allocation need be made. Sub-section (2) of that section enacts that any party affected by an order under sub-section (1) may within such time as may be prescribed apply to the Court to modify or set aside such order but, subject to the result of such application, the order of the Board shall be final. Under sub-section (3) of section 9, the Court to which the application should be made is the District Court of Tinnevelly and it follows that the City Civil Judge had no jurisdiction to entertain the plaint. That being so the plaint should be returned for presentation to the proper Court and the suit should not have been dismissed. The dismissal of the suit is therefore set aside and the plaint will be returned to the appellant for presentation to the proper Court. There will be no order as to costs.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE LAKSHMANA RAO.

Ramaswamy Tevar .. *Appellant**

v.

Chinniah Tevar and others .. *Respondents.*

Hindu Law—Joint family—Alienation—Duty of creditor—Absence of proof as to application of surplus of consideration—Sale, if to be set aside.

Where the vendee from the father of a joint Hindu family has acted honestly and after due enquiry as to the existence of necessity, he is not bound to see to the application of the purchase money and a sale cannot be set aside because the vendee is not able to prove conclusively as to how the surplus beyond the legal necessity was applied.

Appeal against the decree of the District Court of East Tanjore at Negapatam, in A.S. No. 149 of 1944, preferred against the decree of the Court of the District Munsiff of Tiruturaipundi in O.S. No. 102 of 1943.

R. Viswanathan and *T. R. Srinivasan* for Appellant.

T. R. Srinivasa Aiyangar and *G. Jagadisa Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The sale cannot be set aside as to 4/9ths of the property sold and upheld as to 5/9ths as done by the District Judge and as found by the District Judge the price for which the property was sold, *i.e.*, Rs. 1,125 was proper. There was legal necessity for the sale to the extent of Rs. 651 and the sons are liable for the balance of Rs. 474 under the rule of pious obligation. The vendee was not cross-examined regarding the representation made by the vendor and it is clear from what precedes in Ex. P-1 (*a*), the reply notice, that the word "brothers" was a slip for "sisters". The marriage of two of the daughters was celebrated about 2 years before the sale and there is no ground for doubting that the vendee acted honestly and after due enquiry as to the existence of necessity. He is not bound to see to the application of the purchase money and as held by the Privy Council in *Sri Krishna Das* v. *Nathu Ram*[1] and *Ram Sunder Lal* v. *Lachmi Narain*[2], the sale cannot be set aside because the vendee was not able to prove conclusively how the surplus was applied. The decree of the District Judge is therefore set aside and the decree of the District Munsiff is restored with costs before the District Judge and here against the first and second respondents.

Leave is refused.

V.S. ——— *Appeal allowed.*

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* S. A. No. 1930 of 1945. 4th March, 1947.

1. (1926) 52 M.L.J. 720 : L.R. 54 I.A. 79 : I.L.R. 49 All. 149 (P.C.).

2. (1929) 57 M.L.J. 7 : I.L.R. 51 All. 430 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

M. A. C. Arunachala Mudaliar and another .. *Appellants**

v.

M. V. Jagannatha Mudaliar and others .. *Respondents.*

Mortgage—Prior and puisne mortgages—Prior mortgagees purchasing the mortgaged properties from the mortgagors after the date of the second mortgage—Suit by puisne mortgagees against mortgagors and prior mortgagees—Liability of prior mortgagees to account for the profits from the date of their purchase.

In a suit on their mortgage by the puisne mortgagees against the mortgagors and the prior mortgagees who had after the date of the second mortgage purchased the mortgaged property from the mortgagors, the latter are accountable for the profits on the mortgaged properties from the date of the sale in their favour.

Natesa Chettiar v. *Ramalinga Chettiar*, (1937) M.W.N. 700 and *Ramachandra Rao* v. *Byragi*, (1937) M.W.N. 910, followed.

Appeal against the decree of the District Court of North Arcot, at Vellore, in A.S. No. 328 of 1944, preferred against the decree of the Court of the District Munsiff of Vellore in O.S. No. 523 of 1943.

T. L. Venkatarama Aiyar for Appellants.

E. Vinayaka Rao for Respondents.

The Court delivered the following

JUDGMENT.—There was a first mortgage by defendants 1 and 2 to defendants 3 and 4 on the 21st June, 1930. There was a second mortgage on the 24th September, 1930, by them in favour of the plaintiffs. Finally, there was a sale deed in favour of defendants 3 and 4 for Rs. 11,275-14-9 of the mortgaged properties. The deeds are Ex D-1, P-1 and D-2 respectively. In a suit upon the second mortgage, Ex. P-1, the lower Courts have held that defendants 3 and 4 are accountable for the profits on the mortgaged properties from the date of the sale in their favour, *viz.*, the 17th May, 1934. This decision is challenged in this second appeal preferred by defendants 3 and 4 who say that they occupied two capacities, *viz.*, a capacity as prior mortgagees under Ex. D-1 and a capacity as purchasers of the equity of redemption under Ex. D-2 and that the two capacities should be kept distinct so far as the puisne mortgagees are concerned who have to redeem their mortgage Ex. D-1, by payment of the principal and interest without any liability on their part to account for the rents and profits which they have enjoyed since the date of their purchase under Ex. D-2. So far as our Court is concerned, this question is concluded by the authority of some Bench rulings and there is no purpose served by reopening the question and urging on the strength of stray observations in earlier cases that if the mortgagee has been in possession in his capacity as purchaser from the mortgagor, he is not under a liability to account. The decisions against the appellants are reported in *Natesa Chettiar* v. *Ramalinga Chettiar*[1] and *Ramachandra Rao* v. *Byragi*[2]. The former decision is by a Bench consisting of Madhavan Nair and Stodart, JJ., and the latter is by Varadachariar, J. Observations in support of the same position are found in *Bappu* v. *Venkatachalapathi Iyer, Lakshmana Iyer and Sons*[3] and *Ramachandra Naidu* v. *Pavalayammal*[4], both of them again Bench decisions. The only case that can be said to be in favour of the appellant is the judgment of a single Judge, Ananthakrishna Aiyar, J., in *Pichaikonar* v. *Narasimha Rama Iyer*[5].

A distinction was sought to be made out between a case where the property is purchased in Court aution under a defective decree in a suit in which the puisne mortgagee is not impleaded as a party and who is therefore not bound and a

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* S. A. No. 2074 of 1945. 8th January, 1947.

1. (1937) M.W.N. 700.
2. (1937) M.W.N. 910.
3. (1933) 64 M.L.J. 606.
4. (1934) 68 M.L.J. 717.
5. (1929) 58 M.L.J. 343.

case where the property is purchased under a private sale from the mortgagors themselves. That there is no room for any such distinction is pointed out in *Muthammal* v. *Raju Pillai*[1].

This is not a case where it could be said that the appellants paid any price for the equity of redemption. The amount for which the properties were sold is the amount due under the first mortgage for principal and interest. The release of two items of the properties is of no consequence because both the Courts have found on the evidence in the case that the inclusion of those items in the mortgage in favour of the appellants was due to a mistake and that the sale deed did not comprise properties lesser in number than those covered by the mortgage. In *Natesa Chettiar* v. *Ramalinga Chettiar*[2], which was no doubt a case on foot of a decree obtained on the first mortgage without impleading the puisne mortgagee, it was held that the profits that the prior mortgagee-purchaser makes out of the land are deemed to be the property of the mortgagor in his hands and liable to be credited in reduction of the prior mortgage and that the fact that the price paid by him is more than the amount due on the mortgage sued on does not take away his liability to account. The rulings referred to by me are binding against me and the second appeal must therefore be dismissed with costs. (No leave).

V.S. *Appeal dismissed*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD UTHWATT, LORD DU PARCQ, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Kapalavayi Kasi Rama Rao and another .. *Appellants**

v.

Kotta Venkataratnam .. *Respondent.*

Trust—Choultry—Dedication to trust—Inference—Circumstances—Evidence of invitation for prathishta *ceremony—Value—Costs—Respondent* ex parte *in appeal to the Privy Council—Direction for payment of the costs of the appellant on appeal being allowed—Justification.*

The owner of the property in suit had never divested himself of the property which remained registered in his name and there was no evidence that he ever declared himself as a trustee of it for a charitable purpose—to be used as a *Dharma Chatram*—or ever acted as such trustee and there was no deed of trust. But there was evidence of a letter of invitation sent for the opening ceremony of the new *Dharma Chatram* which was to be consecrated (*prathishta*) on a particular auspicious day. On a question whether there was dedication of the property to a Charitable Trust,

Held, that the evidence while establishing that the owner of the property contemplated that the property would be used as a rest house, did not establish that he ever carried out his intention to dedicate the property or decided upon the nature of the proposed trust. The opening ceremony to which the invitation related cannot be taken to have carried out the arrangement contemplated in the letter in the absence of satisfactory evidence as to what took place at the ceremony or as to whether there was any formal dedication of the property at that ceremony.

Though the respondent had not appeared on appeal to the Privy Council, their Lordships in allowing the appeal felt themselves justified in directing the respondent to pay the costs of the appellant as the latter had been put to the expense of appealing to His Majesty in Council owing to the conduct of the respondent in appealing against the decision of the Subordinate Judge.

Judgment of the High Court reversed.

P. V. Subba Row and *R. Parikh* for Appellants.

Respondent *ex parte.*

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from a judgment and decree of the High Court of Judicature at Madras dated 1st December, 1943, which reversed

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1. (1917) I.L.R. 41 Mad. 513 at 516. 2. (1937) M.W.N. 700.

* P. C. Appeal No. 67 of 1945. 5th March, 1947.

a judgment and decree of the Court of the Subordinate Judge, Guntur, dated 31st March, 1942.

The question in the appeal is whether certain property described in the plans to the plaint is the private property of the appellants or dedicated to the public for charitable purposes.

On the 27th June, 1935, the respondent who was formerly in the employ of the original plaintiff, Kapilavi Mallayya (hereinafter called "the plaintiff") made an application by Original Petition No. 73 of 1935 to the District Judge of Guntur, under section 3 of the Charitable and Religious Trusts Act XIV of 1920 alleging that the said property was public charitable trust property and praying for a direction to the plaintiff to furnish particulars as to the nature and object of the trust, the value, condition and management and the application of the trust property and of its income.

On the 29th November, 1937, the District Judge of Guntur made an Order upon the said O.P. 73 of 1935 that the property was a charitable institution; that the plaintiff was the founder thereof and the dedication by him to the public had been completed by Exhibit "E" to the said Petition, which is Exhibit D-1 in these proceedings.

That Exhibit is in the following terms:—

Sree Rama. Subhamasthu.

Letter of invitation for the opening ceremony of the new *Dharma Chatram* (free choultry) to M.R.Ry. Nagasarapu Lakshmayya, news as to welfare written by Kapalavayi Subbarayudu Garu's son Mallayya.

The learned persons decided that, on the auspicious Monday, Vyshaka Sukla of the year Vibhava (corresponding to 2nd May, 1928) under the constellation of *chitta* star in the Dhanurlagnam at 10-30 Vighadiyas, in the night corresponding to hours 10-31 minutes, the *Dharma Chatram* (free choultry) built for the use of the sojourners, in the western bazaar of the Narasaraopeta village should be consecrated, that on 3rd May, 1928, there will be the feeding of Brahmins and that on 5th May, 1928, there will be celebrations of Rukmini Kalyanam and Vyshya feeding. So you are requested to come with family and friends to those functions, grace the same with your presence and bless me.

Yours obediently,

Kapalavayi Mallayya.

Narasaraopeta,
29th April, 1928.

The word translated "consecrated" in the said Exhibit is the vernacular word "Prathishta" which is defined in Wilson's Glossary as "Consecration or setting up of an image, or a temple: a ceremony performed on the completion of a house before it is inhabited; also, purification or re-consecration of an idol, house, or temple that has been polluted."

On the 11th July, 1940, the plaintiff commenced this suit against the respondent. In his plaint he alleged that the building marked "A" in the plan accompanying the plaint and the row of shops marked "B" in the same plan were the absolute property of the plaintiff built with his own funds; that the portion of the building marked "A" was constructed by the plaintiff with the intention of establishing it as a private charitable choultry (*i.e.*, rest-house) under the management of members of the plaintiff's family, but the intended private trust had not been created and no dedication of the property either as a private or public trust had been made nor had the plaintiff at any time decided what was to be the nature and scope of the charity in the choultry whether it was to be the provision of free lodging for any defined purposes or classes of persons whether it was to be free feeding

and if so to whom, or whether it was to be anything else. The plaint further alleged that the portion of the building marked "A" was being used for letting out to wayfarers and travellers and the rents so collected were being utilised and enjoyed by the plaintiff absolutely; that the said part was also being utilised by the plaintiff for feeding some Brahmins and Vaisyas; that the feeding was at the discretion of the plaintiff, and the expenses for the same were being met by him from his own funds no endowment having been made therefor either by the plaintiff or by anybody else. It was further alleged that the portion of the building marked "B" was being let out as shops and the rents were being collected by the plaintiff and the same were being enjoyed by him as his own property at his own absolute discretion; and that the entire building was registered in the name of the plaintiff in the municipal registers and he had been paying the taxes therefor. The plaintiff claimed a declaration that the said properties were the plaintiff's own absolute and private property, and that the order in O. P. No. 73 of 1935 on the file of the District Court of Guntur might be set aside. As the plaintiff was not prepared to pay the court-fee in respect of the claim for a declaration, that claim was struck out.

The plaintiff died pending the suit and the appellants were brought on record as his personal representatives, and the plaint duly amended.

The respondent to this appeal, who was the only defendant to the suit, filed a written statement challenging the allegations of fact in the plaint, claiming that the property in suit had been dedicated by the plaintiff to a public charitable trust, and contending that the matter was *res judicata* by reason of the decision of the District Judge in O. P. No. 73 of 1935. He also claimed that the suit did not lie against him in his personal capacity.

At the trial the learned Subordinate Judge held that the order on O. P. No. 73 of 1935 did not found a claim of *res judicata* relying on the decision of this Board in *Babu Bhagwan Din and others* v. *Gir Har Saroop and others*[1], and with this opinion their Lordships agree. The learned Judge then considered the question whether a Charitable Trust had been created in respect of the property in suit, and came to the conclusion that it had not. He pointed out that there was no Deed of Trust, and no attempt by the plaintiff to divest himself of the property in suit, and he considered that there was no evidence of any dedication of the property to a Charitable Trust. He thought that the Prathishta ceremony amounted to nothing more than a formal opening of the *dharma chatram* or free choultry, or rest-house which had been admittedly built by the plaintiff on part of the property, accompanied as would be natural in the case of an orthodox Hindu, by some religious ceremonies. Accordingly, the learned Judge set aside the order of the District Judge made upon O. P. No. 73 of 1935.

From that decision the respondent appealed to the High Court of Madras, though it is difficult to appreciate what personal interest he had in the matter.

On the 1st December, 1943, the High Court allowed the appeal holding that the property had been dedicated as a public charity. For this they relied almost exclusively upon Exhibit D-1, the letter of invitation to the Prathishta ceremony. They stated that the word "prathishta" is used only in connection with the consecration of a building as a public charitable or religious trust, though this view seems inconsistent with the definition in "Wilson" which gives the meaning attributed to the word by the Subordinate Judge as a secondary meaning. The learned Judges did not, of course, regard the letter D-1 as in itself a dedication, but they thought that the ceremony to which the invitation in D-1 related must be taken to have carried out the arrangement contemplated in the invitation. Their Lordships are unable to agree with the view of the High Court. Admittedly some ceremony took place on the 2nd May, 1928, but there is no satisfactory evidence as to what took place at that ceremony; it is not shown that there was any formal dedication

1. (1940) 1 M.L.J. 1 : L.R. 67 I.A. 1 : I.L.R. 15 Luck. 1 (P.C.).

of the property at that ceremony, nor even that the word "prathishta" was used thereat. The plaintiff never divested himself of the property which remained registered in his name, and there is no evidence that he ever declared himself a trustee of it for a charitable purpose, or ever acted as such trustee. Nor is there any evidence as to the nature of the supposed trust, except that according to Exhibit D-1 the property was to be used for sojourners, meaning presumably travellers, but whether the use was to be confined to any particular class of travellers, and whether any charge was to be made for the use of the premises by travellers does not appear. The shops erected on the land marked "B" were built as the evidence shows after the ceremony of the 2nd May, 1928, and the plaintiff received the rents from such shops for his own use. Without these rents there would be no endowment for the choultry which would require money to be spent for its upkeep. In their Lordships' opinion the plaint and the evidence, whilst establishing that the plaintiff contemplated that the property in suit would be used as a rest-house, which their Lordships assume would be a charitable purpose, do not establish that he ever carried out his intention to dedicate the property, or decided upon the nature of the proposed trust. In their Lordships' opinion the view of the learned Subordinate Judge was right and this appeal must be allowed. The respondent has not appeared on the appeal but the appellants have been put to the expense of appealing to His Majesty in Council owing to the conduct of the respondent in appealing against the decision of the learned Subordinate Judge, and their Lordships see no reason why the respondent should not pay the costs of the appellants.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed; that the Order of the High Court of Madras dated 1st December, 1943, be set aside and that the Order of the Subordinate Judge dated 31st March, 1942, be restored. The respondent must pay the costs of the proceedings throughout.

Solicitors for Appellant: *Lambert and White*

H.J.U./V.S. *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from a Court Martial Holden at Calcutta.)

PRESENT:—LORD THANKERTON, LORD PORTER, LORD SIMONDS, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Mohammad Yakub Khan .. *Petitioner**

v.

The King-Emperor .. *Respondent.*

Privy Council—Right of appeal to the Judicial Committee—Test—Appeal against findings of a Court Martial under the Army Act—Competency.

The jurisdiction of the Judicial Committee of the Privy Council is purely statutory, resting on the Judicial Committee Act of 1833, and the Amending Acts. Where it is sought to bring an appeal from an order of a Court established under the provisions of an Act framed long after the Act of 1833, their Lordships would have to consider, not whether there are express words taking away prerogative, but whether there ever was the intention of creating that tribunal with the ordinary incident of an appeal to the Crown.

The Indian Army Act intended the findings of a Court Martial as and when confirmed by the proper confirming officer to be final, subject only to the power of revision for which that Act provides. There is no room for an appeal to His Majesty in Council consistently with the subject-matter and scheme of that Act.

A. G. P. Pullan and *J. M. R. Jayakar* for Petitioner.

D. N. Pritt, K.C. and *R. K. Handoo* for Respondent.

Their Lordships' Judgment was delivered by

LORD THANKERTON.—The jurisdiction of the Judicial Committee of the Privy Council is purely statutory, resting on the Judicial Committee Act of 1833 and

* 20th January, 1947.

the amending Acts. The material provision is in section 3 of the Act of 1833 which reads as follows: "All appeals or complaints in the nature of appeals whatever which either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule or order of any Court, judge or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of His Privy Council, and such appeals, causes and matters shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to His Majesty in Council for his decision thereon" as therein provided.

Where it is sought to bring an appeal from an Order of a Court established under the provisions of an Act framed long after the Act of 1833, the competence of the appeal must be determined by the test laid down by Lord Cairns in *Theberge and Another* v. *Laudry*[1], where Lord Cairns says this: "In other words their Lordships have to consider, not whether there are express words here taking away prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown." Applying this test, their Lordships are clearly of opinion that the Indian Army Act intended the findings of a Court Martial as and when confirmed by the proper confirming officer, to be final, subject only to the power of revision for which this Act provides. There is no room for an appeal to His Majesty in Council consistently with the subject-matter and scheme of the Act.

Their Lordships will, therefore, humbly advise His Majesty that the Petition should be dismissed.

Solicitors for petitioner: *Douglas Grant and Dold.*

Solicitor for Respondent: *Solicitor, India Office.*

H.J.U./V.S. *Petition dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras*.)

PRESENT:—LORD THANKERTON, LORD UTHWATT, LORD DU PARCQ AND SIR JOHN BEAUMONT.

Thiagaraja Bhagavathar and another .. *Appellants*†

v.

The King-Emperor .. *Respondent.*

Criminal Procedure Code (V of 1898), section 411-A (Amendment of 1943)—Appeal on a matter of fact—Principles governing the granting of leave—Powers of the Court of Appeal in disposing the appeal—Verdict of jury cannot be upheld merely on the ground that it is not perverse or unreasonable—Danger of construing an Indian Act by reference to an English Act—Difference between Indian and English law in regard to the power of Courts of Appeal in dealing with verdicts of juries.

An appeal under section 411-A of the Criminal Procedure Code on a matter of fact can only be brought on a certificate of the trial Judge or with the leave of the Court of Appeal. A Judge hearing an application for leave to appeal on facts has an absolute discretion to grant or withhold such leave, but it is a discretion to be exercised judicially. He is bound to consider any special features in the particular case, but he cannot ignore the effect which the granting of leave to appeal without due discrimination may have upon the whole system of trial by jury in the High Court. Leave once having been granted, however, the matter is at large and the Court of Appeal must dispose of the appeal upon the merits paying due regard however to the principles on which Courts of Appeal always act in such cases. In exercising the power conferred by the Code and before reaching its conclusion upon fact, the High Court should always give proper weight and consideration to such matters as, the views of the jury implicit in their verdict as to the credibility of the witnesses, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of an appellate Court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. If, attaching due weight to these matters, the Court

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1. (1876) 2 A.C. 102 at 108.

* (1946) 1 M.L.J. 42: I.L.R. (1946) Mad. 389.
† P. C. Appeal No. 79 of 1946. 27th March, 1947.

hearing an appeal on the facts under section 411-A, Criminal Procedure Code, comes to the conclusion that the verdict of the jury was wrong, it is bound to allow the appeal and reverse the verdict. It has no right to uphold the verdict merely on the ground that it is not perverse or unreasonable. So to do would be to deprive the appellant of the right of appeal which the statute gives him.

Ganpat Jivaji v. *The King-Emperor*, I.L.R. (1945) Bom. 724, Approved; *Government of Bombay* v. *Inchya Fernandez*, I.L.R. (1945) Bom. 754, overruled.

It is always dangerous to construe an Indian Act by reference to an English Act, however closely the language of the two Acts may approximate, and this is particularly true of acts dealing with such a matter as trial by jury in which the attitude of the Legislatures in the two countries has been dissimilar in many respects.

The elision in section 411-A of section 418 and section 423 (2), which would have prevented an appeal on facts, and the omission of any limitations on the powers of the Court similar to those contained in section 4 (1) of the English Criminal Appeal Act of 1907, make it clear that the Indian Legislature was not minded to impose on the powers of the Court of Appeal in India any fetter similar to that imposed on the English Courts of Criminal Appeal in dealing with the verdicts of juries.

Judgment of the High Court reported in (1946) 1 M.L.J. 42 : I.L.R. (1946) Mad. 389, reversed.

This was an appeal by way of special leave of the Board against convictions for conspiracy and abetment to commit murder and is concerned with the powers of the High Court under Section 411-A of the Code of Criminal Procedure where the appeal relates to both facts and law.

D. N. Pritt, K.C. and *P. V. Subba Rao* for Appellants.

G. O. Slade, K.C. and *D. A. Grant* for Respondent.

Pritt, K.C.—Under section 411-A of the Code of Criminal Procedure when the High Court comes to consider an appeal on matters of fact it should consider all the facts and make up its mind as to what ought to be done, giving the verdict of the jury no more than the weight of the fact that the jury has seen the witnesses. The High Court's view that on an appeal of that kind they ought not to upset the jury's verdict if there was material on which it could be based and it did not appear to be an unreasonable verdict, proceeds on the wrong principle. In the light of the legislative position in which section 411-A was enacted, it should be construed in favour of the appellants. The section means what it says and on an appeal to the High Court against either a conviction or an acquittal which involves a question of fact only, the right construction is that the Court must hear the appeal in the ordinary way. The High Court have erred in going straight to the English Law. The proper test is as laid down in *Shee Swarup* v. *The King-Emperor*[1]. The test here is not the unreasonableness of the verdict, but that the Court had full power to review at large the evidence, and giving proper weight to the consideration of all matters including the opinion of the jury, should conclude whether the conviction should stand or not. There is nothing in Indian Law which puts the verdict of a jury on any particular pedestal at all.

(Reference was made to *Abdul Rahim* v. *The King-Emperor*[2]; *Ramanugrah Singh* v. *The King Emperor*[3].

Slade, K.C.—In *Abdul Rahim's case*[2] the Board laid it down that the primary duty of an Appellate Court on the hearing of an appeal is indicated in section 423 (1) of the Criminal Procedure Code. In other words the test in appeals on facts from the verdict of a jury is whether there is sufficient grounds for interfering. There is an analogy between that and sections 307 and 411-A. While it is conceded that there is no express limitation on the power of the High Court under section 411-A, if the construction for which the appellants contend is put on section 411-A, the extraordinary result follows that the Appellate Court can decide the case *de novo* without ever seeing a single witness, and it comes to this that the Appellate Court can substitute their own view for that of the jury. Where there is no evidence improperly rejected or admitted and the accused has been acquitted, and the prosecution gets a certificate under section 411-A (2), because the prosecution happens to disagree with the jury's verdict, and they take the matter before the High Court on appeal, the construction for which the appellants contend of section 411-A, in such a case is that the Appellate Court may in substance make themselves the jury instead of the persons provided by the Legislature.

(Reference was made to *Ganpat Jivaji* v. *The King-Emperor*[4]; *Government of Bombay* v. *Inchya Fernandez*[5]).

Due weight cannot be given to the verdict of the jury when it is not known on what it is based; it might be based on false premises. It is difficult to see how *Abdul Rahim's case*[2] is put against me. There the jury's verdict was vitiated by misreception of inadmissible evidence and misdirection. The principles laid down in *Shee Swarup's case*[1] do not apply in a case on appeal from the verdict of a jury.

1. (1934) 67 M.L.J. 664 : L.R. 61 I.A. 398 : I.L.R. 56 All. 645 (P.C.).
2. (1946) 2 M.L.J. 1 : L.R. 73 I.A. 77 at 87, 90 : I.L.R. (1946) Lah. 119 (P.C.).
3. (1946) 2 M.L.J. 200 : L.R. 73 I.A. 174 : I.L.R. 25 Pat. 601 (P.C.).
4. I.L.R. (1945) Bom. 724.
5. I.L.R. (1945) Bom. 754.

Grant followed for the Respondent.

Pritt, K. C., replied for the Appellants.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—These are consolidated appeals by special leave from a judgment of the High Court at Madras in its appellate criminal jurisdiction, dated the 29th October, 1945, which affirmed a judgment of the same Court in its original criminal jurisdiction, dated the 3rd May, 1945.

The appellants were tried by the said High Court, with certain other persons, for conspiracy under section 120-B of the Indian Penal Code and abetment to commit murder under section 302 read with section 109, and were convicted on both charges, and sentenced to transportation for life. They appealed to the High Court, and by an order dated the 12th July, 1945, the Appellate Court allowed them to appeal on matters of fact as well as of law under section 411-A (1) (*b*) of the Code of Criminal Procedure.

The appeal raises an important question as to the scope of the powers of the Court under section 411-A of the said Code which was introduced into the Code by Act XXVI of 1943. In order to appreciate the effect of the new section, it is desirable to notice the provisions of the Code relating to trials by jury in the High Courts, and to appeals from the verdicts of juries in Sessions trials held in the Moffussil.

The High Courts in the old Presidency Towns of Madras, Calcutta and Bombay possess, under their Letters Patent, original criminal jurisdiction, and section 267 of the Code of Criminal Procedure directs that all criminal trials before a High Court shall be by jury. Section 274 provides that in trials before the High Court, the jury shall consist of nine persons, and section 299 imposes upon the jury the duty of deciding all questions of fact. Under section 305, the judge is bound by the unanimous opinion of the jury, but when the jury are divided and as many as six are of one opinion and the judge agrees with them, the judge shall give judgment in accordance with such opinion. Under the letters patent affecting such High Courts, there is no appeal from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction, though a point of law may be reserved by the trial Judge, or may be brought before the Court on a certificate of the Advocate-General.

In the case of trial by jury in a Court of Session in the Moffussil, there is a right of appeal against conviction under section 410 of the Code, and against acquittal under section 417. But section 418 provides (1) that an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only. (2) Notwithstanding anything contained in sub-section (1) or in section 423, sub-section (2), when, in the case of a trial by jury, any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law. This sub-section must be read with section 374 which requires any sentence of death passed by a Court of Session to be confirmed by the High Court. Section 423 (1) confers various powers upon the Court of appeal but sub-section (2) provides :

> "Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

Section 449 allows an appeal from the verdict of a jury upon a matter of fact as well as upon a matter of law in cases tried under Chapter 33 of the Code which relates to cases in which European and British Indian subjects are concerned. It may be noticed also that it is provided under section 307 that if the judge disagrees with the verdict of the jurors or a majority of them and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he shall submit it accordingly, and on such reference the High Court may exercise any of the powers which it may exercise on an appeal, and shall dispose of the reference as provided in the section.

In that state of the law, Act XXVI of 1943, enacted as follows :—

"*Insertion of new section 411-A in Act V of 1898.*—After section 411 of the Code of Criminal Procedure, 1898 (V of 1898) (hereinafter referred to as the said Code), the following section shall be inserted, namely :—411-A. *Appeal from sentence of High Court.*—(1) Without prejudice to the provisions of section 449 any person convicted on trial held by a High Court in the exercise of its original criminal jurisdiction, may, notwithstanding anything contained in section 418 or section 423, sub-section (2) or in the Letters Patent of any High Court, appeal to the High Court—

(*a*) against the conviction on any ground of appeal which involves a matter of law only ;

(*b*) with the leave of the appellate Court, or upon the certificate of the judge who tried the case that it is a fit case for appeal, against the conviction on any ground of appeal which involves a matter of fact only, or a matter of mixed law and fact, or any other ground which appears to the appellate Court to be sufficient ground of appeal ; and

(*c*) with the leave of the appellate Court, against the sentence passed unless the sentence is one fixed by law.

(2) Notwithstanding anything contained in section 417, the Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction, and such appeal may, notwithstanding anything contained in section 418, or section 423, sub-section (2), or in the Letters Patent of any High Court, but subject to the restrictions imposed by clause (*b*) and clause (*c*) of sub-section (1) of this section on an appeal against a conviction, lie on a matter of fact as well as a matter of law."

The Act contains certain consequential amendments of the Code and of the Letters patent to which it is not necessary to refer.

In the appeal of the appellants to the High Court at Madras, the leading judgment was given by the learned Chief Justice. He considered the powers which the Court possessed where leave to appeal on the facts had been given. He noticed that clauses (*a*), (*b*) and (*c*) of sub-section (1) of section 411-A, followed the language of clauses (*a*), (*b*) and (*c*) of section 3 of the English Criminal Appeal Act, 1907. But he also noticed that there was omitted from the Indian Act any provision corresponding to section 4 (1) of the English Act which provides :

"The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal."

The learned Chief Justice then discussed various decisions of English Courts upon the Criminal Appeal Act, 1907, and expressed the view that the powers of the High Courts in India were similar to those of the Court of Criminal Appeal in England notwithstanding the omission of any provision corresponding to section 4 (1) of the English Act, and that the Court had power to set aside the verdict of a jury, if on consideration of the facts and of the circumstances of the case, it was convinced that the verdict was unreasonable. After considering the evidence against the appellants and the summing up by the trial judge, the Court held that the jury had been properly directed and that there was material on which their decision could reasonably be based. Accordingly, without considering whether or not the Court agreed with the verdict of the jury, the appeal of the appellants was dismissed.

Before considering the correctness of the judgment under appeal their Lordships will notice certain decisions upon section 411-A which have been given by the High Court of Judicature at Bombay. In the case of *Ganpat Jivaji* v. *The King-Emperor*[1], leave to appeal on the facts had been granted *ex parte* by the Court of Appeal. The leading judgment was given by Chagla, J., Lokur and Weston, JJ., concurring. Mr. Justice Chagla expressed the view that it was impossible on the construction of section 411-A to hold that the powers of the Court were limited as were those of the Court of Criminal Appeal in England; that where an appeal on facts was before the Court, the Court was bound to dispose of it like any other appeal on

1. I.L.R. (1945) Bom. 724.

facts, and that if the Court came to the conclusion that the verdict of the jury was wrong they could not uphold it on the ground that it was not perverse or unreasonable. But the learned Judge expressed the fear that the introduction of section 411-A, construed in the manner in which he felt bound to construe it, would reduce trial by jury in the High Court to a mockery, and he expressed some surprise that the Legislature should have treated the verdict of a High Court jury based on the summing-up of a High Court judge as of less consequence than a verdict of a Moffussil jury. The question as to the construction of section 411-A was considered by another Full Bench of the Bombay High Court in the case of *Government of Bombay* v. *Inchya Fernandez*[1]. In that case the jury had returned a unanimous verdict of not guilty and the trial judge, Mr. Justice Chagla, had given a certificate authorising an appeal on the facts. The leading judgment was given by Divatia, J. Lokur and Weston, JJ., the other members of the Court delivered separate but concurring judgments. Mr. Justice Divatia expressed the view that although the powers of the Court hearing an appeal on the facts under section 411-A were unfettered, the Court was not bound to exercise its powers in full, and that it was entitled to deal with the appeal on grounds analogous to those upon which the High Court acted when hearing a reference made under section 307 of the Code and to interfere with the verdict of the jury only if satisfied that such verdict was perverse and unreasonable. The Court held that there had been no failure in the summing-up, and that the verdict of the jury could not be regarded as either opposed to the evidence or manifestly wrong or unreasonable, and accordingly dismissed the appeal. The views of Chagla, J., in the earlier case were treated as dicta only. That case has been followed in other cases in the High Court of Bombay and appears to be regarded as having settled the law on the subject.

Their Lordships have not been referred to any decision of the High Court at Calcutta, which is the other High Court possessing original criminal jurisdiction.

It will be observed that the High Court at Madras and the High Court at Bombay have both reached the conclusion that in an appeal upon the facts under section 411-A, the Court should only interfere with the verdict of the jury if it considers such verdict perverse or clearly unreasonable, but they have reached such conclusion on quite different grounds. Their Lordships think that both Courts, in their anxiety to prevent the introduction of a right of appeal under section 411-A from destroying the effective operation of trial by jury in the High Courts, have overlooked the important safe-guard provided by the Legislature against such risk. An appeal on a matter of fact can only be brought on a certificate of the trial judge or with the leave of the Court of Appeal. In view of the importance obviously attached throughout the Code to the verdict of juries, to the difficulty which always faces a Court of Appeal when called upon to appreciate the evidence of witnesses whom it has not seen, to the risk of undermining the sense of responsibility of juries if their verdicts are subject to frequent appeal, and to the danger of depriving those tried in the High Court of the effective enjoyment of the right to trial by jury conferred upon them by the Code, their Lordships think that the Indian Legislature may well have assumed that leave to appeal upon the facts from the verdict of a jury would not be given so long as such verdict appeared to be reasonable and supported by the evidence, and not to have been induced by an error in the summing-up. A judge hearing an application for leave to appeal on the facts has an absolute discretion to grant or withhold such leave, but it is a discretion to be exercised judicially. He is bound to consider any special features in the particular case, but he cannot ignore the effect which the granting of leave to appeal without due discrimination may have upon the whole system of trial by jury in the High Court. Leave once having been granted, however, the matter is at large, and the Court of Appeal must dispose of the appeal upon the merits paying due regard however to the principles on which Courts of Appeal always act in such cases. Those principles were summarized by Lord Russell of Killowen delivering

1. I.L.R. (1945) Bom. 754.

the opinion of the Board in the case of *Sheo Swarup* v. *The King-Emperor*[1], where the Board was considering the powers which the High Courts possess in hearing an appeal against acquittal, in the following passage :—

> "But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

Only slight modifications in that passage are necessary to adapt it to an appeal against the verdict of a jury. It is of course true that the Court of Appeal does not know what view the jury took of the evidence of any particular witness, but it knows the view which the jury took of the evidence as a whole. In the passage above quoted for the words "the views of the trial judge as to the credibility of the witnesses" must be substituted the words "the views of the jury implicit in their verdict as to the credibility of the witnesses." If, attaching due weight to those matters, the Court hearing an appeal on the facts under section 411-A comes to the conclusion that the verdict of the jury was wrong, it is bound to allow the appeal and reverse the verdict. It has no right to uphold the verdict merely on the ground that it is not perverse or unreasonable. So to do would be to deprive the appellant of the right of appeal which the Statute gives to him.

In their Lordships' opinion the High Court of Madras in the judgment under appeal approached the case from the wrong angle. It is always dangerous to construe an Indian Act by reference to an English Act however closely the language of the two Acts may approximate, and this is particularly true of Acts dealing with such a matter as trial by jury in which, as pointed out by the Board in the case of *Abdul Rahim* v. *The King-Emperor*[2], the attitude of the Legislatures in the two countries has been dissimilar in many respects. The elision in section 411-A of section 418 and section 423 (2), which would have prevented an appeal on facts, and the omission of any limitations on the powers of the Court similar to those contained in section (4) (1) of the English Act, make it clear, their Lordships think, that the Indian Legislature was not minded to impose on the powers of the Court of Appeal in India any fetter similar to that imposed on the English Court of Criminal Appeal in dealing with the verdicts of juries.

Referring to the Bombay cases, their Lordships are in agreement generally with the view of the law expressed by Mr. Justice Chagla in *Ganpat Jivaji's case*[3]. Whether the fear expressed by the learned Judge that the right of appeal given by section 411-A will reduce trial by jury in the High Courts to a mockery must depend on the manner in which the judges of the High Courts exercise the powers conferred upon them by the section. If judges make a practice of giving leave to appeal on facts from the verdict of a jury which is not perverse or unreasonable on the ground that the judge himself does not agree with the verdict, or that he thinks that the Court of Appeal might take a different view of the evidence from that which appealed to the jury (as Mr. Justice Chagla himself seems to have done in *Inchya Fernandez's case*[4]) the result no doubt will be to deprive people tried in the High Court of the effective enjoyment of their right to trial by jury; but the remedy lies in the hands of the judges.

Their Lordships are not in agreement with the views expressed in the case of *Inchya Fernandez*[4]. There is no analogy between the hearing of an appeal under section 411-A and the hearing of a reference under section 307. As held by this Board in the case of *Ramanugrah Singh* v. *The King-Emperor*[5], the powers of the Court

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1. (1934) 67 M.L.J. 664: L.R. 61 I.A. 398: I.L.R. 56 All. 645 (P.C.).
2. (1946) 2 M.L.J. 1: L.R. 73 I.A. 77 at 87, 90: I.L.R. 1946 Lah. 119 (P.C.).
3. I.L.R. (1945) Bom. 724.
4. I.L.R. (1945) Bom. 754.
5. (1946) 2 M.L.J. 200: L.R. 73 I.A. 174: I.L.R. 25 Pat. 601 (P.C.).

on such a reference are conditionaed by the terms of the section, which imposes a special Code and is not concerned with appeals. The Court hearing an appeal on the facts under section 411-A is in a similar position to a Court hearing an appeal from the verdict of a jury under section 449, or an appeal from the verdict of a jury which has resulted in the passing of a death sentence under sections 374 and 418 (2), in both of which cases an appeal lies on the facts. In the latter class of case it could hardly be suggested that the Court would be justified in dismissing an appeal and confirming a sentence of death based on the verdict of a jury which the Court thought wrong, though not perverse.

As the High Court at Madras did not apply its mind to the question whether the verdict of the jury finding the appellants guilty was right or wrong but considered only whether it was reasonable, their Lordships will humbly advise His Majesty that this appeal be allowed and the appeal of the appellants against their conviction on the 3rd May, 1945, by the trial Judge to the High Court of Judicature at Madras be remitted to that Court to be disposed of according to law.

Solicitors for Appellants : *Barrow, Rogers and Nevill.*

Solicitor for Respondent : *Solicitor, India Office.*

H.J.U./V.S. *Appeal allowed and appeal remitted to High Court.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Ramanjulu Naidu, *In re* .. *Appellant.**

Penal Code (XLV of 1860), sections 73, 379 and 75—Solitary confinement—When to be ordered—Conviction under sections 379 and 75—Absence of any aggravating circumstances—Direction for solitary confinement—If justified.

Solitary confinement should not be ordered unless there are special features appearing in the evidence such as extreme violence or brutality in the commission of the offence.

When a person is convicted under sections 379 and 75 of the Indian Penal Code and sentenced to rigorous imprisonment for two years, a direction that three months out of that period should be served in solitary confinement is not warranted when there are no exceptionally aggravating circumstances in the case. That the " sanctity of home life has become to the accused a mere mockery and the desire to take what he wants regardless of ownership is hot in him " is not a circumstance justifying the direction for solitary confinement.

Appeal against the sentence passed by the Special Honorary Presidency Magistrate of the Court of the Presidency Magistrate, Egmore, Madras, dated 27th January, 1947, in C.C. No. 31947.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

Accused not represented.

The Court made the following

ORDER.—I have given notice of this appeal to the Crown Prosecutor and heard him.

The appellant has been convicted by the Special Honorary Presidency Magistrate under sections 379 and 75 of the Penal Code and sentenced to rigorous imprisonment for two years. The Magistrate has further directed under section 73 of the Indian Penal Code that out of the above period of imprisonment, three months should be passed in solitary confinement.

The conviction is undoubtedly warranted by the evidence. When P.W. 1, after shopping with his wife and another person boarded a tram, the appellant

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* Crl. Appeal No. 114 of 1947. 12th March, 1947.

and another person boarded the same tram. The appellant pushed P.W. 1 forcibly and in that act snatched away a pocket watch with a rolled gold chain which was in the possession of P.W. 1. The appellant swiftly passed on the watch and the chain to the other person. P.W. 1 and others present immediately caught hold of the appellant and handed him over to the police.

Before the Magistrate, the appellant admitted the offence and also the previous convictions. Looking at the list of previous convictions, it is clear that he commenced his career as a habitual thief as early as 1921 and his last conviction was by this Court in S.C. No. 13 of 1943 in the Third Criminal Sessions in which he was convicted under sections 380 and 75 of the Indian Penal Code and sentenced to four years' rigorous imprisonment. I would therefore confirm the conviction and the sentence of rigorous imprisonment for two years. But the direction that three months out of that period should be served in the solitary confinement is not necessary. There are no exceptional aggravating circumstances in the case to warrant such a direction. In fact when the provision in section 73 of the Indian Penal Code was introduced there was a similar provision in the corresponding English Act, but even in those days the power to impose solitary punishment was very rarely exercised by Criminal Court by way of sentence. Even that provision was done away with during the reign of Queen Victoria. Solitary confinement should not be ordered unless there are special features appearing in the evidence such as extreme violence or brutality in the commission of the offence. The only reason given by the Magistrate is that the " sanctity of home life has become to him (the appellant) a mere mockery and the desire to take what he wants regardless of ownership is hot in him." This can be said of every person convicted under section 379 of the Penal Code and I do not consider that to be a circumstance justifying the passing of an order of solitary confinement. The direction regarding solitary confinement will be deleted. In other respects the appeal is dismissed.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

The Tirumalai Tirupati Devasthanams Committee, represented by its Commissioner, Sri A. Jayaram Naidu and others .. *Petitioners**

v.

N. Chengama Naidu and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 115—Revisional jurisdiction of High Court—Scope—Order for temporary injunction—Whether can be passed.

The revisional jurisdiction of the High Court is only a variety or form of appellate jurisdiction and consequently it is competent for the High Court to issue a temporary injunction in its revisional side.

Petition praying that in the circumstances stated in the affidavits filed therewith, the High Court will be pleased to issue a temporary injunction restraining the respondents from interfering in any manner with the free uninterrupted flow of water from the plaint channel to the lands of petitioners 2 to 7 in the villages of Nainarkhandriga and Krishnamarajakhandriga in O.S. No. 365 of 1945, District Munsiff's Court, Tirupati, pending C.R.P. No. 102 of 1947 presented to the High Court to revise the order of the District Court, Chittoor, dated 23rd September, 1946, in C. M. A. No. 17 of 1946 (I.A. No. 821 of 1945 in O.S. No. 365 of 1945, District Munsiff's Court, Tirupati).

W. S. Krishnaswami Naidu for Petitioners.

W. Chakrapani Naidu for Respondents.

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* C. M. P. No. 506 of 1947. 19th March, 1947.

The Court made the following

ORDER.—This is a petition by the plaintiffs in O.S. No. 305 of 1945 (District Munsiff's Court, Tirupati) for a temporary injunction restraining the respondents who are the defendants in the suit from interfering in any manner with the free and uninterrupted flow of water from the plaint channel to the petitioners' lands. The suit was filed for a declaration that plaintiffs 2 to 7 are entitled exclusively to the supply of water from the suit channel and for a permanent injunction restraining the defendants from interfering with that supply and from taking away water from that channel in its course towards their lands. An application for a temporary injunction was made in the trial Court and the District Munsiff who had granted an *ad interim* injunction made that injunction absolute on 14th December, 1946, in I.A. No. 821 of 1945. The defendants in the suit had filed I.A. No. 894 of 1945 to set aside the interim injunction and that petition wad dismissed. Appeals were taken to the District Court, Chittoor, against the orders of the District Munsiff and in C.M.A. Nos. 17 and 18 of 1946, the District Judge practically cancelled the order of injunction although he described his order as an order modifying the District Munsiff's order. What all was done by the appellate Court was to require the defendants to deposit a sum of Rs. 300 in the trial Court as security for damages, should they be eventually unable to prove their case. This is how the learned Judge wound up his order :

> "I am modifying the lower Court's order only on an interim basis and that too on conditions, and in the interests of equity and the raising of as much crop as possible in these days of scarcity and threatening famine."

The learned District Munsiff, however, has in his reasoned order examined all the essential aspects that were required to be scrutinised in an application of this character. He considered how far there was a *prima facie* case in favour of the petitioners, he examined the balance of convenience ; and also as to whether either party would suffer irreparable loss or injury. I do not find that any of those material considerations entered into the discussion of the case by the learned District Judge.

Before going into the merits of the case I must take note of a preliminary objection that was raised by Mr. Chakrapani Naidu to the maintainability of the petition. He contended, rather ingeniously, that no relief by way of a temporary injunction can be given by this Court in a civil revision petition. He referred to section 107 of the Code of Civil Procedure which provides that an appellate Court should have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein, and he argued that in exercise of those powers and duties the appellate Court may grant a temporary injunction or a relief of that character. Under section 115, which deals with the powers of a Court of Revision it was contended that no such power was vested and that the only order that could be passed under that section was a final order on the revision petition. He then referred to section 141 which enacts that the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction and argued that that section has been held by this Court to be inapplicable to such cases. For this position he relied upon two decisions none of which seems to be apt. The first is the decision of Patanjali Sastri, J., sitting singly, in *Rama Kurup* v. *Kunhipathumma*[1], where the learned Judge merely stated that a civil revision petition that was filed in this Court could not be returned as it cannot be presented as a civil revision petition to a District Court and that for that purpose section 141 of the Code was unavailable. The second case is *Sadaya Padayachi* v. *Chinnasami Naidu*[2], which only decided that section 141 does not confer a right of appeal when no such right otherwise has been given, since section 141 deals only with procedure, whereas the right of appeal is a substantive right which has to be expressly conferred. Cases that are more germane

1. (1942) 2 M.L.J. 99. 2. (1935) 69 M.L.J. 99.

to the question at issue are the two Full Bench decisions of this Court reported as *Chappan* v. *Moidin Kutti*[1] and *Chidambara Nadar* v. *Rama Nadar*[2]. Before referring to these cases a passage may be extracted from Story which throws a flood of light on this matter :

"The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial tribunals an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted and acted upon by some other Court, whose judgment or proceedings are to be revised."

Again the learned author says :

"An appellate jurisdiction may be exercised in a variety of forms and indeed in any form which the Legislature may choose to prescribe." (Commentaries on the Constitution of the United States, section 1761.)

I may point out that revisional jurisdiction is in its essence and substance a variety or form of appellate jurisdiction which the Legislature has chosen to prescribe. This matter was gone into at length in the former of the two Madras Full Bench cases cited above, which was decided by six learned Judges of this Court. Subramania Aiyar, J., observed in that case at page 81 referring to the appellate jurisdiction :

"Such jurisdiction may be exercisable only in certain specified classes of cases. Its exercise may be claimable by a party as a matter of right or only subject to his obtaining the leave of the Court which passed the decision to be appealed against. Again, the power to review or revise may be confined to points of law or may extend to matters of fact also. Clearly legislative provisions as to such matters only lay down some of the limitations under which the jurisdiction is allowed to be exercised. Nor are the conditions, prescribed by section 622 for the exercise of the power of revision conferred by it, different in essence from the kind of limitations just above referred to and more commonly imposed by Legislatures on the exercise of appellate functions. But none of such limitations however much it may circumscribe the exercise of the power, touches, as already remarked, the intrinsic quality of the power itself. Now, as section 622 in question gives in terms to this Court the power to revise decisions of Courts subordinate to it, it follows that the essential criterion of appellate jurisdiction, enunciated in the above quotation (from Story) is present in the case of proceedings held by this Court under that section and that the power exercised in such proceedings is therefore a part of the Court's appellate jurisdiction. It may not be out of place to add that to take the word 'appellate' in the sense explained above, is not opposed even to ordinary usage."

This view was again reiterated by another Bench of three learned Judges of this Court in the second of the cases cited above, *Chidambara Nadar* v. *Rama Nadar*[2]. The question there was one of limitation but incidentally the point arose whether a remedy by way of revision does not differ in essence from a right of appeal ; and it was held that it does not as has often been declared by the Judicial Committee (page 625). In *Rajah of Ramnad* v. *Kamid Rowther*[3], their Lordships of the Judicial Committee referring to a civil revision petition, thus observed :

"From this judgment an appeal in the form appropriate to such a case from the Munsiff's Court, *i.e.*, a civil revision petition, was preferred to the High Court of Madras."

(See also *Baijnath Sahai* v. *Ramgut Singh*)[4]. In *Nagendranath De* v. *Sureshchandra De*[5], the question as to what amounted to an appeal under Art. 182 (2) of the Limitation Act arose, and the language of their Lordships, in view of the present question raised, though it does not directly bear upon it, is both suggestive and significant. After setting out the facts of *Nagendranath De's case*[5], the learned Judges observed thus in *Chidambara Nadar* v. *Rama Nadar*[2], as to the effect of the judgment of their Lordships of the Privy Council referred to above :

"Their Lordships held that any application by a party to an appellate Court to set aside or revise a decree or order of a Court subordinate thereto is an 'appeal' within the meaning of that provision [Article 182 (2)] . . . . and it is with the words used by their Lordships in this connection that we are here concerned. 'There is no definition of 'appeal' in the Civil Procedure Code,' they

1. (1898) 8 M.L.J. 231 : I.L.R. 22 Mad. 68 (F.B.).
2. (1937) 1 M.L.J. 453 : I.L.R. (1937) Mad. 616 (F.B.).
3. (1926) 50 M.L.J. 503 : L.R. 53 I.A. 74 : I.L.R. 49 Mad. 335 (P.C.).
4. (1896) L.R. 23 I.A. 45 : I.L.R. 23 Cal. 775 (P.C.).
5. (1932) 63 M.L.J. 329 : L.R. 59 I.A. 283 : I.L.R. 60 Cal. 1 (P.C.).

observe, 'but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of that term and that it is no less an appeal because it is irregular or incompetent.' True, much importance cannot be attached to the word 'revise' in this passage, as their Lordships were not adverting to what is technically known as a revision petition; but the view, that there is no essential difference between a remedy by way of appeal and by way of revision, is considerably reinforced by the passage in question and its value becomes all the greater when we bear in mind that their Lordships made these observations in construing the very provision with which we are now concerned."

After the weighty pronouncement of the Judicial Committee in the three cases cited above and the Full Bench decisions of this Court it is too late in the day to question the authority of this Court to entertain applications of this kind in a civil revision petition. Learned counsel for the petitioner invoked the aid of section 151 of the Code of Civil Procedure and contended that to meet the ends of justice this Court in exercise of its revisional jurisdiction can grant such relief since there is no other express provision made in that behalf. There is considerable force in this contention but I would prefer to base my conclusion on the broader footing that revisional jurisdiction is a variety or form of appellate jurisdiction and that as such this Court has authority to issue a temporary injunction on its revisional side. The objection must, therefore, be overruled.

Coming to the merits of the case, I have already indicated that the order of the learned District Munsiff is sound and that he has considered the matter in a proper judicial bearing, while the order of the District Judge has proceeded, at least partly, upon extra-judicial considerations. The fact so far as this matter is concerned, are fairly simple. The channel A. B. according to the Commissioner's plan, takes off at *A* from the river Aruna and at *B* it enters the lands belonging to plaintiffs 2 to 7 and irrigates a very large expanse of two thousand *kuntahs* (6 *kuntahs* : one acre) of registered wet land belonging to them. It is supplemented by another source coming from a place marked *D* in the same plan which is called the Kasam. The plaintiffs claim an exclusive right to both these sources of supply. The defendants own about 100 *kuntahs* south of the channel A. B. and their lands are registered as dry or as Manavari which means rainfed. The fact that the lands are registered as dry or rainfed clearly shows that they are not entitled to any registered source of water supply. There are a number of wells and such cultivation as was going on, it is urged by the plaintiffs, was from water from those wells. The learned District Munsiff has taken into account in granting the temporary injunction a number of documents, including the Jamabandi Chitta accounts for faslis 1279, 1302, 1311 and 1313. He has also examined the adangal accounts and pattas of Aranyam Khandriga and from a scrutiny of the documentary evidence in the case he has come to the conclusion that *prima facie* this is a fit matter in which a temporary injunction should be granted in favour of the plaintiffs as prayed for.

On the question of irreparable injury he found that both parties were well-to-do and there was no difficulty about one reimbursing the other for damages.

Again with regard to the balance of convenience he was of the opinion that the balance was entirely on the side of the plaintiffs. I am in entire agreement with these findings. No doubt some claim is being made by the defendants but it will be open to them to establish their claim in the suit and if they succeed they will necessarily get damages for the loss of profits during this period.

I would therefore allow the petition with costs, and grant the temporary injunction in terms prayed for to enure until the disposal of the civil revision petition.

B.V.V. *Petition allowed.*

[END OF (1947) I M.L.J.]

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